84-843

Office-Supreme Court, U.S.
FILED
OCT 31 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RUDY DURAND and KOALA PRODUCTIONS, LIMITED,

Petitioners,

v.

SIMON PRODUCTIONS NO. 2, INC.; SIMON FILM PRODUCTIONS, INC.; MELVIN SIMON PRODUCTIONS, INC.; MELVIN SIMON; NATIONAL BROADCASTING COMPANY, INC.; WARNER BROS., INC.; VIACOM INTERNATIONAL, INC.; MYRON L. SLOBODIEN; LEROY BOBBITT; LOEB and LOEB; JOHN FRANKENHEIMER; RICHARD B. KAPLAN; and KAPLAN, LIVINGSTON, GOODWIN, BERKOWITZ and SELVIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner Rudy Durand acting in pro se was denied due process due to a local rule which violated his constitutional rights, those rights being the right to select an attorney of his choice and discrimination against the pro se's right to utilize local and federal rules and statutes thereby denying his constitutional right to prosecute his case.

Whether the Petitioners Lanham Act claim as stated in its First Amended Complaint and as amended by the matters introduced outside the pleadings is sufficient to withstand a Rule 12(b)(6) or a Rule 56 Motion to Dismiss and, if not, should Petitioners be permitted to complete discovery before a final decision on the Motion to Dismiss in the face of grievous procedural errors committed in the District Court and left uncorrected by the Court of Appeals.

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APPENDIX

A. Order of United States Court of Appeals for the Ninth Circuit, dated May 20, 1981.

B. Order of the United States Court of Appeals for the Ninth Circuit, dated August 27, 1981.

C. Memorandum opinion of Hon. Consuella B. Marshall, U.S.D.C.J., dated June 30, 1983, dismissing with prejudice First Amended Complaint pursuant to F.R.C.P. 12(b)(1).

D. Decision of United States Court of Appeals for the Ninth Circuit, dated June 8, 1984, affirming on the basis of F.R.C.P. 12(b)(6) or 56, the dismissal with prejudice of First Amended Complaint.

E. Order of United States Court of Appeals for the Ninth Circuit, dated August 2, 1984, denying rehearing en banc.

F. Reply Memorandum of Rudy Durand against Local Rule 1 of the Central District of California, filed July 31, 1981, in the United States Court of Appeals for the Ninth Circuit.

G. Affidavit of Rudy Durand, filed August 19, 1981, in the United States Court of Appeals for the Ninth Circuit in support of Emergency Motions.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1125(a): False designations of origin and false descriptions forbidden

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or service, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or likely to be damaged by the use of any such false description or representation.

28 U.S.C. § 1654: Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Local Rule 1, Central District of California

(2) Pro Hac Vice. An attorney who is not eligible for admission under paragraph (a) hereof, but who is a member in good standing of, and eligible to practice before, the bar of any United States Court or of the highest court of any State or of any Territory or Insular Possession of the United States, who is of good moral character, and who has been retained to appear in this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate in a particular case. Unless authorized by the Constitution of the United States or Acts of Congress, an attorney is not eligible to practice pursuant to this paragraph (b) if any one or more of the following apply to him: (i) he resides in California, (ii) he is regularly employed in California, or (iii) he is regularly

engaged in business, professional, or other activities in California.

The pro hac vice application shall be presented to the Clerk and shall state under penalty of perjury (i) the attorney's residence and office addresses, (ii) by what court he has been admitted to practice and the date of admission, (iii) that he is in good standing and eligible to practice in said court, (iv) that he is not currently suspended or disbarred in any other court, and (v) if he has concurrently or within the year preceding his current application made any pro hac vice application to this Court, the title and the number of each matter wherein he made application, the date of application, and whether or not his application was granted. He shall also designate in his application a member of the bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers shall be served. He shall file with such application the address, telephone number, and written consent of such designee.

The pro hac vice application shall also be accompanied by payment to the Clerk of any prescribed

fee, together with any required assessment which the Clerk shall place to the credit of the Attorneys' Admission Fund or appropriate Court Library Fund. If the pro hac vice application is denied, the Court may refund any or all of the fee or assessment paid by the attorney. If the application is granted, the attorney is subject to the jurisdiction of the Court with respect to his conduct to the same extent as a member of the bar of this Court.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Rudy Durand and Koala Productions, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in which that Court affirmed the decision of the District Court

of the Central District of California granting Respondents' Motion to Dismiss the Petitioners' Complaint.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, unreported appears in the Appendix hereto.

JURISDICTION

The Petitioners' motion for rehearing en banc was overruled by the United States Court of Appeals for the Ninth Circuit on August 2, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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Whether Petitioner Rudy Durand acting in pro se was denied due process due to a local rule which violated his constitutional rights, those rights being the right to select an attorney of his choice and discrimination against the pro se's right to utilize local and

federal rules and statutes thereby denying his constitutional right to prosecute his case.

Whether the Petitioners Lanham Act claim as stated in its First Amended Complaint and as amended by the matters introduced outside the pleadings is sufficient to withstand a Rule 12(b)(6) or a Rule 56 Motion to Dismiss and, if not, should Petitioners be permitted to complete discovery before a final decision on the Motion to Dismiss in the face of grievous procedural errors committed in the District Court and left uncorrected by the Court of Appeals.

STATEMENT OF CASE

Petitioners filed their Complaint for Damages and Injunctive Relief under the Sherman Act and the Lanham Act in the Central District of California on March 18, 1981. On May 5, 1981, Petitioners filed a First Amended Complaint for Damages under the Sherman Act and Lanham Act.

On May 6, 1981, Petitioners applied to the Ninth Circuit Court of Appeals for writs of mandamus/prohibition to require the District Court to conduct a hearing on Durand's Application for Re-

moval/Disqualification of the trial judge and to require the District Court to conduct a hearing on Petitioners' Application to reinstate Counsel of Record. On May 20, 1981, the Ninth Circuit ordered Respondents to respond to the writ application and invited an amicus brief from Los Angeles County Bar Association on the constitutionality of the Central District's Local Rule 1 governing the admission of attorneys to practice before the Court. (See Appendix A).

On June 9, 1981, Petitioners filed in the Ninth Circuit a Motion for Stay of Proceedings (28 U.S.C. 2106) in the District Court alleging that the district court had ordered all matters stayed, including discovery on May 19, 1981, and had, based on that Order, refused to calendar Petitioner's motions, including discovery motions. In violation of her own order, however, the district judge calendared Defendants' Motion to Dismiss the First Amended Complaint which had been filed May 27, 1981.

On August 19, 1981, Petitioners filed in the Ninth Circuit an Emergency Second Supplemental Motion to Stay Proceedings, Emergency Supplemental Mo-

tion for Preliminary Hearing, and Application to have Motion Heard [F.R.C.P. 2, 8, 33 and 28 U.S.C. 1651] after learning that NBC intended a prime time broadcast of the Warner Bros. version of "TILT" sometime in September, 1981. (See Appendix G). Briefs were filed at the Ninth Circuit by Petitioners, Respondents and the Los Angeles County Bar Association. (See Durand's Reply Memorandum, Appendix F).

On September 9, 1981, the Ninth Circuit denied the writ, declined to address the constitutionality of Local Rule 1, unless the challenge was made below and referred all emergency matters, including the Motion to Stay Proceedings, to the District Court for immediate consideration.

On September 21, 1981, Petitioners filed a Motion for Temporary Restraining Order with points and authorities and affidavits in support. On September 22 the trial court declined to hear the Temporary Restraining Order pending a decision from Chief Judge Hauk concerning Petitioner's ex parte application for relief from order (Rule 60B) and second application by Durand to remove the trial judge in which he alleged

that employment by the judge's husband as an arbitrator in the entertainment industry created a conflict of interest for the trial judge. Judge Hauk set the matter for hearing September 28, 1981.

On September 25, 1981, Petitioner applied to the Ninth Circuit for an immediate hearing on his Motion for a Preliminary Injunction. Petitioner asked that certain judges in the Central District Court be disqualified from handling the proceedings, asked for emergency stay of proceedings in the District Court, and sought reinstatement of attorney of record. On September 30 the Ninth Circuit ordered the District Court to hear the Motion for Preliminary Injunction before 4:00 P.M. on October 2, 1981. It also declined to disqualify the trial judges of the Central District Court, ordered a stay of all proceedings in the District Court pending determination of the motion for preliminary injunction, and denied the motion to reinstate Ortego.

On September 28 Judge Hauk denied all Petitioner's pending motions, including questions as to Local Rule 1, banished Ortego from the U.S. Courthouse and Clerk's Office in Los Angeles and ordered

that he cease advising Durand. Thereby overriding the Ninth Circuit Court's demand that the constitutional challenge as to Local Rule 1 be first heard below. On September 29, 1981, Mr. Ortego applied to the Ninth Circuit for relief. The Court of Appeals directed the Central District not to enforce any oral orders issued against Mr. Ortego until the orders were set forth in writing and it had acted on Ortego's petition filed September 30, 1981. Subsequently Judge Hauk's order concerning Ortego was reduced to writing and the Ninth Circuit directed the District Court not to enforce the order.

On October 2, 1981, the trial court heard Petitioner's Motion for Preliminary Injunction and denied it.

On January 18, 1983, the trial court heard Respondents' Motion to Dismiss and on June 30, 1983, dismissed with prejudice the First Amended Complaint against all defendants based on F.R.C.P. 12(b)(1) holding, inter alia, that neither the First Amended Complaint nor the proposed Second Amended Complaint raised any federal question. (See Appendix C).

Petitioners filed timely appeal on the Lanham Act claim to the Ninth Circuit Court of Appeals and, after briefs and oral argument, the Ninth Circuit, in an unpublished opinion, affirmed the result reached by the trial court. The Court of Appeals held that the trial judge erred in dismissing the First Amended Complaint under F.R.C.P. 12(b)(1), but that the First Amended Complaint would nonetheless be dismissed under F.R.C.P. 12(b)(6) or 56. (See Appendix D). Petitioner filed timely Application for Rehearing en banc, which was denied on August 2, 1984. (See Appendix E).

The matter is now before the Supreme Court of the United States of America upon application for a Writ of Certiorari and is timely filed with this Court pursuant to Rule 20 of the Rules of the Supreme Court.

STATEMENT OF FACTS

This Lanham Act claim arose when the Respondents injected into the stream of interstate commerce an unauthorized and artistically distorted version of the Petitioner's film, substituting it for

Petitioner's final cut version, and thereafter advertising, broadcasting and distributing the distorted version as the contractually authorized final version of Rudy Durand's "TILT." In an effort to simplify the complex history of this case, Petitioner will relate only those facts relevant to the issues before the Court.

Durand wrote a screenplay entitled "TILT." The copyright was vested in his company, Rudy Durand Productions, Ltd. On May 24, 1977, Durand and his company sold the copyright to Respondent Simon No. 2 so that Simon could produce a motion picture based on the screenplay. The Agreement gave Durand the exclusive right to make the "final cut" of the motion picture, that is, Durand was given complete creative control over the final version of the motion picture which would ultimately be distributed to theatres around the country. This type of arrangement wherein the artist retains absolute artistic control and discretion over the making of his film was unprecedented in the history of the movie industry. Durand had flatly refused on several other occasions to sell or bargain for his screenplay unless he had retained directorial final

cut and complete creative control over the finished product. In fact, Durand rejected previous offers for the screenplay, including a substantial offer from Respondent NBC, because the offers did not promise this right.

While Durand was in the process of editing the film, the Simon organization literally closed his cutting room door. Simon told Durand that Warner Bros. had bought the film, that Warner Bros. demanded certain editing changes, and that Durand was required to make those changes under the terms of his agreement with Simon. All parties agree that Warner Bros. never bought the film and never made editing demands and it was in fact the Simon organization which demanded the editing changes. All parties further agree that Durand resisted making the changes because the changes offended his own commercial and artistic judgment.

Durand sought advice from his attorneys, Respondents Loeb and Loeb, in an effort to regain his artistic autonomy. Loeb and Loeb advised him that his contract with Simon did in fact require him to edit the

film as desired by the U.S. distributor who Loeb and Loeb alleged was Warner Bros. Loeb and Loeb had acted as Durand's attorneys for several years and had negotiated the contract in question. Nonetheless, Loeb and Loeb ratified Simon's deception by intentionally misadvising Durand concerning his rights under the contract with Simon. Several months earlier Loeb and Loeb told Durand they had been hired by the Simon organization, but assured him that they would protect his interests in his film, "TILT."

Upon the advice of his attorneys Durand edited the film in accordance with what he believed were Warner Bros.' demands. A Warner Bros. release of the film was distributed to ten cities. This, however, was not "Rudy Durand's 'TILT'": It was a product of Respondents' deception.

Durand thereafter discovered the deception when he went to Warner Bros. and offered to relinquish all monetary interest in the film in exchange for an opportunity to recut the film according to his own commercial and artistic judgment. Warner Bros. confessed the deception and admitted they did not own the

picture, had no remaining rights to the picture and that Simon was and had always been the owner. Durand then demanded his final cut from Simon, who acknowledged the deception and agreed with Durand that his contractual rights had been violated. Thereafter Simon financed the final cut originally promised to Durand in the May 24, 1977 contract. In October, 1979 Durand completed the final cut of "Rudy Durand's 'TILT'" which, at this time, became the only contractually authorized version of "TILT."

The two versions of the film differ significantly. Durand's final cut eliminated major sequences included in the Warner Bros. version. Durand's final cut exhibited a new continuity, altered the emphasis on the main characters and modified the story line to make Brooke Shields the moving force in the final version. The Warner Bros. version included numerous scenes which made the male lead, Ken Marshall, the primary character.

Durand contacted the several distributors named as Respondents herein to inform them that he had completed the final version of "TILT" and only this

version of the picture could be shown and distributed. Durand explained that only he had the right promised by his contract to designate the final edited version and since he had done so, Respondents were not authorized to show any other version. Durand scurried frantically to gather assurances from the several Respondents that the distorted first Warner version would be shelved in favor of his fully cut final version. Those promises proved empty indeed when, after Durand personally delivered a print of his film to Century City and after a video copy was made directly from it for future broadcast and distribution, Durand received a call at the eleventh hour before "TILT's" broadcast from one of the named Respondents informing him that his final version would not be aired.

Respondents repeatedly failed and refused to exploit the contractually authorized version. Instead, the Respondents substituted the earlier Warner version for Durand's final version and, over Durand's strenuous objection, Respondents widely disseminated on network and cable television the version that Durand was coerced into editing, obviously an expressed re-

verse palming off as the final version of Durand's "TILT."

Durand tried valiantly to create an interest within the industry for his picture. But after the illegal version had been so widely viewed and so poorly received by the public, his efforts proved to be utterly futile. The artist's lifetime endeavor was lost within the machinations of the despotic movie industry.

On October 1, 1981, Respondent Viacom broadcast the coerced version on cable television in Los Angeles. Viacom also broadcast the coerced version in other parts of the country at various times. On October 3, 1981, and again on April 4, 1982, Respondent NBC broadcast the unauthorized version on prime time nationwide commercial network television. The NBC showing alone was, by Respondents' admission, seen by 30 million people.

ARGUMENT

Petitioners' First Amended Complaint was filed on May 4, 1981. The Respondents have never answered either the Complaint or the First Amended Complaint. The Petitioner's Lanham Act claim consists

of the factual allegations contained in the First Amended Complaint, quoting therefrom as follows:

> (a) The contractually unauthorized cutting of the picture by Defendants Warner and the Simon Entities and the fraud and misrepresentations to Durand of Melvin Simon, the Simon Entities, Loeb and Loeb, Slobodien and Bobbitt and the actions of NBC and Viacom has caused the injection into the stream of interstate commerce of a film bearing the name of plaintiffs which product was in fact a commercialized distortion of the artistic product sold to Simon No. 2 and intended by plaintiffs; and
>
> (b) The public display by Defendants Warner and Viacom of the Warner version of the picture has injured Plaintiff Koala's business and Plaintiff Durand's business, professional and artistic interests by disregarding the right to have their work attributed to them in the form in which they created it.

This allegation largely mirrored the allegation made in the First Complaint except that Durand's former attorneys were now cited for their fraud and misrepresentations, and Viacom and NBC were cited for their actions in broadcasting or planning to broadcast what all parties are now referring to as the Warner Bros. version of "TILT." These charges were revealed as a result of the only discovery permitted Petitioners

in the entire proceedings. On April 14, 1981, Magistrate Geffin granted Petitioners' request to shorten time for Defendants to produce certain documents. Jim Ortego represented Koala and Durand appeared pro se at the hearing before Magistrate Geffin. It would be for Petitioners the last favorable ruling on any motion filed by either side during the entire proceedings in the Central District of California and the last discovery afforded Petitioners in litigation, despite repeated requests for discovery.

The Lanham Act claim anticipated the decision of the Ninth Circuit in Smith v. Montoro, 648 F. 2d 602 (9th Cir. 1981), which was decided on June 1, 1981, nearly three months after the Complaint was filed. Smith v. Montoro, a case of first impression in the Ninth Circuit, held that an actor whose contract guaranteed him use of his name in the credits and advertising of a film stated a cause of action under the Lanham Act when his Complaint alleged that his name had been removed from both the film credits and advertising. This movement toward protection of an artists' contractual rights under the Lanham Act placed

the Ninth Circuit in line with the other Circuit dominating entertainment industry law, the Second Circuit. In Gilliam v. American Broadcasting, 538 F. 2d 14 (2d Cir. 1976) the Second Circuit held that the television broadcast of a program properly designated as having been written and performed by an artist, but which had been edited without the author's consent into a form that departed substantially from the original work violates the Lanham Act. Petitioners repeatedly referred to both these cases, but especially Smith v. Montoro in all relevant pleadings at both the district and appellate levels, but neither the District Court's dismissal with prejudice under F.R.C.P. 12(b)(1) nor the Ninth Circuit's unpublished opinion affirming the dismissal with prejudice under F.R.C.P. 12(b)(6) or 56 ever referred to Smith v. Montoro.

A cause of action is averred under the Lanham Act under Section 43(a) if (1) plaintiffs and defendants are "persons" (2) defendants use a false designation or false representations (3) in connection with a good or service (4) which defendants caused to enter into commerce (5) and petitioners believe them-

selves to have been damaged by the false descriptions or false representations. Collijan v. Artistries Club of New York, Ltd., 442 F.2d 686 at 689 (2d Cir. 1971), cert. denied 404 U.S. 1004 (1971). The term "persons" includes both individuals and corporations. 15 U.S.C. 1127.

Petitioner's First Amended Complaint alleges that a "commercial distortion" of Durand's film was injected into the stream of interstate commerce, that it was fraudulently misrepresented as Durand's final cut version and that Petitioners' commercial and artistic interests were damaged thereby because Respondents violated the Lanham Act by disregarding Petitioners' right to have his work attributed to him in the form in which he created it. Smith v. Montoro held that the Lanham Act explicitly condemns false representations in connection with motion pictures. In addition, a person who is in the business of providing his talent for use in the entertainment industry is "uniquely situated to complain of injury resulting from a film distributor's misidentification of appellant's contribution to the product." Smith v. Montoro, supra, at 608.

There is no question but that the trial court erred in dismissing with prejudice Petitioners' complaint as failing to state a claim under Lanham. The Ninth Circuit so held, but then dismissed the complaint with prejudice, stating that there was "ample evidence to dismiss Durand's action under Rule 12(b)(6) or 56." Defendants' Motion to Dismiss should have been treated as a Motion for Summary Judgment under Rule 56 by both courts. Defendants offered affidavits in support of their Motion to Dismiss and Petitioners also filed affidavits and exhibits in support of their claim. At the October 1, 1981, hearing on Petitioner's Motion for Preliminary Injunction, the Petitioners interjected new matters outside the pleadings which were not objected to and were not excluded by the Court. These matters, existing outside the pleadings and unobjected to amended the pleadings under F.R.C.P. 15(b) and related back to the date of the Original Complaint. No Court has ever referred to these matters, which conclude that pursuant to the basic agreement between the Director Guild of America and the industry, an agreement to which all corporations are signatories, Durand and

Durand only has the right to determine which version of "TILT" is to be exploited. These allegations have never been responded to by any party.

The remaining question, therefore, is whether or not Respondents were entitled to a summary judgment under Rule 56. All parties agree on certain material facts: Durand had the right to a final cut of the picture consistent with his own artistic judgment. Simon induced Durand into making certain editing changes by misrepresenting to him that Warner Bros. had bought the picture, demanded the editing changes, and that Durand was required by his contract with Simon to make the changes. Durand initially resisted the editing demands but eventually did acquiesce since he was led to believe the changes were demanded by Warner Bros. Sometime later, Durand made a final cut with Simon's authorization and at Simon's expense. After Durand made his final cut, both NBC and Viacom, with full knowledge of Durand's contractual rights and the availability of the final cut, broadcast the Warner Bros. version to millions of people.

Defendants, none of whom have ever answered the lawsuit, argue that (1) Durand went around the country with the Warner Bros. version which was released in ten cities before Durand made his final cut, and (2) Durand took full credit for the film billed "Rudy Durand's 'TILT.'" Petitioners admit Durand actively assisted the promotion of the film, for which he was paid by Warner Bros., and the description of the Warner Bros. version as "Rudy Durand's 'TILT'" is basically accurate. After all, Durand had written the screenplay, chosen the cast and crew, produced the music, built the special pinball machine, and directed the shooting of the picture. Durand, however, only conceded to Warner's editorial demands because of the fraud practiced on him by the Respondents. He gave up his directorial control promised under the contract at his attorney's insistence that good faith compliance required he make the cuts. Respondents now suggest that Durand somehow waived his Lanham Act claim when he, by Respondents' own admission, was fraudulently induced to make those cuts. As a result of the fraud perpetrated by the Respondents on Durand,

Durand helped promote the early version of his film. The Respondents' misrepresentations convinced Durand there would never be another version of his film. The Respondents convinced Durand that by condemning this version of his film he condemned himself. Under duress and as a result of the Respondents' coercive tactics, Durand promoted the premature version of his picture.

Petitioners do not contend that the making of the Warner Bros. version or its immediate exploitation constituted a violation of the Lanham Act. The violations occurred only after Durand had been given by Simon, at Simon's expense, his contractually authorized final cut and Respondents, with full knowledge that the final cut was available and was the only contractually authorized version, nonetheless began to substitute the Warner Bros. version of "TILT" for the fully edited final cut prepared by Durand as his complete statement of his artistic creation.

Defendants have also argued that Durand's final cut was not contractually authorized because it was completed after the contractual time period afforded Durand within which to complete his fully edited

final cut. This argument blithely ignores the fact that the only delays in making the final cut were due to the Defendants' admitted fraudulent inducement of Durand to participate in the Warner Bros. version cutting and test marketing in ten cities. It also ignores the fact that Simon, who is not noted for financial wantonness, paid $50,000.00 for Durand to make the final cut once Durand confronted him with the deception and demanded his contractual rights. Of all the faults attributed to Durand by Respondents, lethargy is definitely not one.

Respondents have further contended that the letter authorizing the $50,000.00 expenditure for Durand's final cut reserved to the Simon organization the ultimate decision as to which version would be exploited, but this convenient rejection of Durand's contractual guarantee was never approved by Durand. Durand has insisted throughout that Simon personally guaranteed him that the final cut, not the Warner Bros. version, would be commercially exploited pursuant to their contract.

From these facts it is clear that if any party was entitled to Summary Judgment it was Petitioners and not Respondents. Even if by some existential leap of the legal imagination either lower court concluded that Respondents were entitled to summary judgment, the Court should have permitted Petitioners the opportunity to complete their long sought discovery of documents in the exclusive possession of Defendants. In this case, as in Program Engineering v. Triangle Publications, 634 F. 2d 1188 (9th Cir. 1980), the party opposing the Motion for Summary Judgment had no previous opportunity to develop crucial evidence material to the issues in the case, thus precluding ruling on the Motion for Summary Judgment until completion of discovery. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even-handed" justice. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

This is not a case in which a party opposing a Motion for Summary Judgment was the least bit dilatory in pursuing discovery. Cf. First National Bank v. Cities Service Co., 391 U.S. 253 (1966). During the

nearly two years that this case was in "litigation" in the Central District of California, Petitioners filed a Request for Production of Documents on April 13, 1981; Ex Parte Application for Order Shortening Time to Respond to Request for Documents on April 13, 1981; on May 20, 1981 an Emergency Ex Parte Application for an Order Requiring all Defendants to Protect and Preserve Documents; on May 20, 1981, an Ex Parte Motion to Compel Compliance with Request for Documents and for Sanctions; another Request for Documents on December 15, 1982 and another Application for Order Compelling Response to the First Request for Documents on December 15, 1982. Of these motions, only one was ever heard: the Ex Parte Application for Order Shortening Time to Respond to Request for Documents was heard by Magistrate Geffin on April 14, 1981, and Petitioners, represented by Ortego and Durand, were successful at that hearing as to some of the documents requested.

Beyond that single instance of moderate success, Petitioners were denied completely any further discovery in this case. On May 5, 1981, Magistrate

Geffin suspended all discovery until June 30, 1981, at a hearing on Durand's Motion to Quash, Vacate, or Extend Time for Taking his Deposition. This was done even though Defendants' response to Petitioners' Request for Documents was due six days later. At the same hearing Magistrate Geffin, on oral motion of Defendants not communicated to Durand before the hearing, ordered sanctions against Durand for merely reading a prepared statement at his deposition detailing his reluctance to testify because the trial court had refused to rule on his Motion to Extend Time for deposition and his unwillingness to provide subpoenaed corporate documents in the absence of corporate counsel who had been first admitted pro hac vice and later removed by the trial judge.

On May 19, 1981, Judge Marshall stayed all further discovery pending a Ninth Circuit ruling on Durand's Prohibition/Mandamus writ application. On October 28, 1982, Respondents sought an ex parte order staying Petitioners' discovery efforts, including the Request for Documents filed September 23, 1982, until the trial court ruled on Petitioners' application for

leave to file second amended complaint or Respondents' Motion to Dismiss. Petitioners filed opposition to the proposed stay order, but on December 17, 1982, Judge Marshall granted the stay order until January 24, 1983. Just prior to this discovery stay Petitioners had moved Magistrate Geffin for an Order compelling response to the first set of documents request, but without even a request from Respondents, Judge Marshall on her own motion ordered this motion off calendar.

Durand repeatedly told the Ninth Circuit that in this case not only did the trial court block discovery by stay of discovery, ordering discovery motions off calendar, and failing to calendar Petitioners' discovery motions, but prevented Petitioners from prosecuting their claim by a less than artful manipulation of local and federal rules and statutes, thus depriving Durand, the pro se plaintiff, due process and his constitutional right for the use of those rules and statutes.

When Petitioners pointed out to the Court that the ex parte application to extend time to plead or otherwise respond, which was filed by Defendants and

signed by Judge Marshall without advance notice to Petitioners, did not comport with local rules or the Federal Rules of Civil Procedure, Judge Marshall ordered her clerk to tell Durand that she would not consider the question. (See Appendix F). When Durand complained to both the trial court and the Ninth Circuit that 28 U.S.C. 1654 prohibited him, as president, from representing his corporation and the corporation's law and motions counsel had been removed as attorney of record by minute order without notice, hearing, or opportunity to be heard Durand was required to appear at his deposition without corporate counsel and sanctioned for not producing voluminous corporate documents, and appear without his chosen co-counsel at a scheduled hearing on an Application for Temporary Restraining Order (Appendix G).

Discovery was only one of the procedural irregularities Petitioners faced in the Central District of California. From the perspective of Durand, the pro se plaintiff, the Central District of California utilized local rules when they advantaged his opposition, and refused to follow local rules if that would advantage

the opposition. On September 28, 1981, Chief Judge Hauk ordered Durand not to file any more removal motions against Judge Marshall including motions as to the question of the constitutionality of Local Rule 1 and threatened sanctions if any were filed. Prior to that time Durand had repeatedly asked the Ninth Circuit to require Judge Marshall to follow her own orders, grant hearings to his motions, cease interfering with the Clerk's records, and follow local and federal rules and statutes.

Durand told the Ninth Circuit he could not rely on Judge Marshall's orders. She admitted Ortego pro hac vice after full disclosure of his residency in California and non-membership in the California bar. Then she reversed herself a month later and "denied" the application without notice, hearing, or opportunity to be heard. Despite repeated efforts Durand could not get the District Court to grant a hearing on his Application to Reinstate Attorney of Record, nor was he successful in persuading the Ninth Circuit to order such a hearing. The Ninth Circuit called for briefs on the constitutionality of Local Rule 1, but declined to

address the issue once the briefs were filed unless the challenge was made below which Durand did but was denied the hearing by Chief Judge Hauk. (Appendix A). He repeatedly told both Courts that 28 U.S.C. 1654 prohibited him from advancing his claim and he was entitled to hearing on Local Rule 1. (Appendix F).

Respectfully note the error contained in the facts of the opinion of the Ninth Circuit that the "Durand version was test released and unsuccessful." Durand's version was never released!

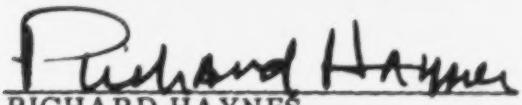
On May 19, 1981, Judge Marshall ordered a stay of all proceedings pending the termination of Petitioners' Prohibition/Mandamus application at the Ninth Circuit. Based on that order she refused to calendar Durand's motions, including a motion to disqualify counsel for conflict of interest. Application for Relief from Order; Emergency Ex Parte Application for Order to Protect and Preserve Documents; Motion to Compel Compliance with Discovery Order and for Sanctions; and an Emergency Motion for Relief (F.R.C.P. 60) which Judge Marshall held in chambers for 16 days before filing it in the Clerk's office. Defendants,

however, had no problems setting dates for their pleadings. Judge Marshall personally calendared their Motions to Dismiss filed on May 27, 1981.

For the foregoing reasons, Petitioners respectfully urge this Court to grant certiorari.

Respectfully submitted,

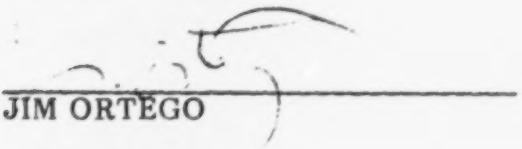
HAYNES & FULLENWEIDER
A Professional Legal Corporation



RICHARD HAYNES

4300 Scotland
Houston, Texas 77007

Counsel of Record



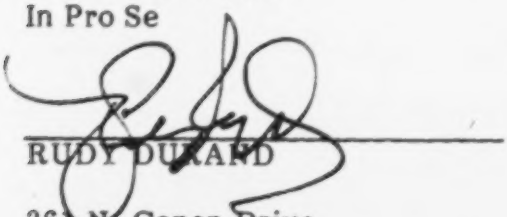
JIM ORTEGO

715 S. Ryan Street
Lake Charles, Louisiana 70601

Of Counsel

Attorneys for Petitioner
KOALA PRODUCTIONS, LTD.

RUDY DURAND
In Pro Se



RUDY DURAND

361 N. Canon Drive.
Beverly Hills, California 90210

PROOF OF SERVICE

STATE OF TEXAS, COUNTY OF HARRIS

I, Judy Fogarty, am a citizen of United States and a resident of the County of Harris. I am over the age of eighteen years and not a party to this action. My business address is 4300 Scotland, Houston, Texas 77007. On October 30, 1984, I served the PETITION FOR A WRIT OF CERTIORARI upon the following individuals by placing a true copy thereof in a sealed envelope with postage fully paid, and mailed it from 4300 Scotland, Houston, Texas 77007:

Peter Nichols, Esquire
WEISSMAN, WOLFF, BERGMAN,
COLEMAN & SCHULMAN
9601 Wilshire Boulevard
Beverly Hills, California

Alan Wilken, Esquire
LOEB & LOEB
One Wilshire Boulevard
Suite 1600
Los Angeles, California 90017

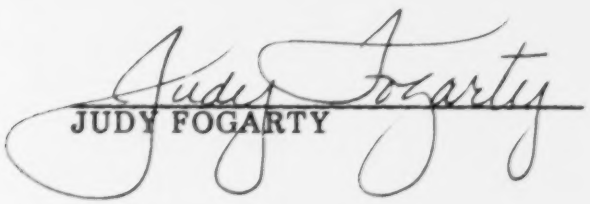
Jean Nogues, Esquire
MITCHELL, SILBERBERG & KNUPP
1800 Century Park East
Eighth Floor
Los Angeles, California 90067

- and -

Clerk
THE SUPREME COURT OF THE
UNITED STATES
One First Street, N.E.
Washington, D.C. 20543
(original and forty copies)

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge.

EXECUTED on October 30, 1984, at Houston, Texas.



JUDY FOGARTY

APPENDIX

A. Order of United States Court of Appeals for the Ninth Circuit, dated May 20, 1981.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIM ORTEGO; RUDY DURAND; and KOALA PRODUCTIONS, LTD.,	)	No. 81-7288
Petitioners,	)	DC# 81-1320 CMB Central California
vs.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	
Respondent,	)	ORDER
SOMON PRODUCTIONS, NO. 2, et al.,	)	
Real Parties in Interest.	)	

Before: GOODWIN and FERGUSON, Circuit Judges

Upon due consideration of the petition for writ of mandamus, the Court issues the following order:

(a) the clerk shall serve a copy of this order upon the interested district judge and all parties to the action below, which service may be made by mail with service on the parties being effected by mailing copies to the parties' attorneys of record in the district court;

(b) answers to the petition shall be filed, according to the provisions of Fed. R. App. P. 21(b),

within twenty-eight (28) days of the date this order is entered;

(c) within forty-two (42) days of the date this order is entered, petitioner may file a reply to any answers that may be filed;

(d) following receipt of any responses and reply, the petition shall be calendared by the clerk for consideration by a panel of this court; and

(e) the clerk shall mail a copy of this order to an appropriate office of the Los Angeles Bar Association. The Los Angeles Bar Association may file a memorandum as amicus curiae on or before the date on which the response or reply of the party whose position it wishes to support is due. The amicus curiae memorandum shall discuss the validity of Local Rule 1 of the District Court of the Central District of California.

APPENDIX

B. Order of the United States Court of Appeals for the Ninth Circuit, dated August 27, 1981.

MEMORANDUM TO CLERK

I certify that the judges concerned concur in this order. Please file it.

_____
United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIM ORTEGO; RUDY DURAND; and KOALA PRODUCTIONS, LTD.,	)	No. 81-7288
Petitioners,	)	
vs.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	ORDER
Respondents,	)	
and	)	
SIMON PRODUCTIONS, NO. 2, et al.,	)	
Real parties in Interest.	)	

Before: WALLACE and BOOCHEVER, Circuit Judges

Upon due consideration, the court issues the following order:

(a) The petition for writ of mandamus is denied. Petitioners have not demonstrated a "clear and indisputable" right to disqualification. See Allied Chemical Corp. v. Daiflon, Inc., 101 S. Ct. 188, 190 (1980). The alleged bias of the trial judge pertains primarily only to adverse trial rulings, which is not a proper basis for establishing bias or prejudice. United States v. Azhocar, 581 F.2d 735 (9th Cir. 1978), cert. denied, 440 U.S. 907 (1979). Having determined that Petitioners have not presented their challenge to the constitutionality of Central District Local Rule 1 to the district court, we decline to address the issue. See California v. Moynahan, 596 F.2d 1320, 1322 (6th Cir. 1979); cf. Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1356 (9th Cir. 1978) (existence of alternative remedy precludes mandamus relief); and

(b) Petitioners' emergency motion to stay proceedings, emergency motion for preliminary hearing, and application to have motion heard are referred to the district court for immediate consideration.

APPENDIX

C. Memorandum opinion of Hon. Consuella B. Marshall, U.S.D.C.J., dated June 30, 1983, dismissing with prejudice First Amended Complaint pursuant to F.R.C.P. 12(b)(1).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUDY DURAND, and individual; KOALA PRODUCTIONS, LTD., as successor in interest to RUDY DURAND PRODUCTIONS, LTD.,	)	CASE NO. 81-1320 CBM(Gx)
	)	ORDER AND MEMORANDUM OPINION
Plaintiffs,	)	
vs.	)	
SIMON PRODUCTIONS NO. 2, INC.; SIMON FILM PRODUCTIONS, INC.; MELVIN SIMON PRODUCTIONS, INC.; MELVIN SIMON, an individual; NATIONAL BROADCASTING COMPANY (NBC); WARNER BROS., INC.; VIACOM INTERNATIONAL, INC.;	)	
Defendants.	)	

This case is before the court on defendants' motion to dismiss plaintiffs' first amended complaint and plaintiffs' motion to file a second amended complaint. The matter was heard on January 17, 1983. Plaintiff Rudy Durand appeared in pro per. T.J. Pantaleo appeared on behalf of plaintiff Koala Produc-

tions, LTD. Peter Nichols, Alan Wilken and Jean Pierre Nogues appeared on behalf of defendants, Simon Productions No. 2, Inc., et al. The matter was taken under submission.

The court, having considered the parties' papers and arguments, finds that neither plaintiffs' first amended or proposed second amended complaints raise any federal questions. Therefore, defendants' motion to dismiss is granted and plaintiffs' first amended complaint is dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiffs' motion to file a second amended complaint is denied because such an amendment would be futile.

I.

FACTS

Plaintiff Rudy Durand[1] ("Durand") is a screenwriter, producer and director. Durand entered into an agreement with defendant Simon Productions No. 2, Inc.[2] to finance the making of a film by Durand entitled "Tilt." Durand was to serve as writer, director, and producer of "Tilt."

The gist of plaintiffs' complaint revolves around the allegations that Durand was denied creative control

of "Tilt." According to the complaint, three versions or "cuts" of "Tilt" were made. All three versions were the work product of Durand, but plaintiffs allege that Durand made two of the three cuts under duress.

The first cut, described by plaintiffs as "hurried and obviously unviable," was previewed in August, 1978. Second Amended Complaint ¶ 21. The critical response to the first cut was unfavorable.

At some point subsequent to the first cut, the Simon defendants entered into an agreement with defendant Warner Brothers Inc. ("Warner") for Warner to distribute "Tilt." Plaintiffs allege that subsequent to the Simon-Warner distribution agreement, Durand was wrongfully deprived of creative control of the movie. They allege that Warner wrongfully demanded that Durand make certain changes in "Tilt" and that Durand acquiesced to these changes only because his attorneys, defendant Loeb and Loeb,[3] wrongfully misadvised him that he had no choice but to submit to the changes. Second Amended Complaint ¶ ¶ 24 and 25.

Plaintiffs label this second cut of "Tilt" as "the Warner version." Second Amended Complaint ¶ 25.

The second cut was previewed in three cites in October 1978. Second Amended Complaint ¶ 23.

Plaintiffs allege that it was this second cut that opened in various cities in April 1979. Second Amended Complaint ¶ 24.[4] The theatrical run was unsuccessful.

Following the theatrical release, Durand cut the film once again. Plaintiffs refer to this final cut as the "Durand version." Second Amended Complaint ¶ 33. They allege that the so-called "Durand version" was "the final cut contractually guaranteed under the basic agreement," Second Amended Complaint ¶ 33, and that the Simon defendants agreed that the "Durand version" of "Tilt" would be the version that was commercially exploited. Second Amended Complaint ¶ 32. The "Durand version" was exhibited once in New York. Second Amended Complaint ¶ 32.

Thereafter, the Simon defendants sold the so-called "Warner version" of "Tilt" to defendant National Broadcasting Co. ("NBC") for broadcast on commercial television[5] and to defendant Viacom International, Inc. for broadcast on cable television.

Thus, the essence of plaintiffs' complaint is that Durand was wrongfully denied creative control of "Tilt" and that his final version of the film (the so-called "Durand version") should have been the version that was sold to commercial and cable television and otherwise exploited.

In the proposed second amended complaint, plaintiffs predicate federal jurisdiction on § 1 of the Sherman Act,[6] 15 U.S.C. § 1 and § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Plaintiffs' remaining claims for breach of contract, fraud, contractual interference, conversion, invasion of privacy, promissory estoppel, conspiracy and for an accounting are pendant.[7]

II.

LEGAL ANALYSIS

A. Standard for Granting Leave to Amend

Fed. R. Civ. P. 15(a) provides:

> A party may amend his pleading once as a matter of course at any time before a response is served. . . Otherwise a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

A court should grant a motion to amend unless a defendant can show undue delay, bad faith or dilatory motive, futility of amendment or prejudice. Foman v. Davis, 371 U.S. 178, 182 (1962).

In the instant case, defendants have not made a showing of either undue delay, bad faith or prejudice. Thus, this court can deny plaintiffs' motion to file a second amended complaint only if such an amendment would be futile. To determine if amendment would be futile, the court must scrutinize the allegations of the second amended complaint, and, therefore, the court's analysis in the instant opinion is principally directed to the proposed second amended complaint.[8]

B. Have Plaintiffs Stated a Cause of Action Under Section 1 of the Sherman Act?

Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Plaintiffs' Section 1 allegations are found at ¶¶ 62-64 of the second amended complaint. The gist

of plaintiffs' Section 1 allegations are that the defendants conspired to deprive Durand of his contractually guaranteed right to creative control of "Tilt," caused only the so-called "Warner version" of "Tilt" to be commercially exploited and prevented the "Durand version" from being distributed or exhibited to the public.

Plaintiffs allege that as a result of the conspiracy, competition in the production and sale of the "Durand version" of "Tilt" has been restrained and that motion picture distributors and the public have been denied the opportunity to exhibit and view the superior "Durand version" of "Tilt."[9]

1. Have plaintiffs stated a cause of action for per se violation of Section 1?

The following four activities have been held per se violations of Section 1:

1. horizontal and vertical price-fixing;
2. horizontal market division;
3. group boycotts or concerted refusals to deal;
4. tie-in sales.

See Gough v. Rossmoor Corp., 585 F.2d 381, 386 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979).

Obviously, the activities of which plaintiffs complain cannot be construed as price-fixing, market division or tying. Plaintiffs' first amended complaint characterized defendants' activities as a group boycott. See n. 9, supra. Although this allegation has been dropped in the second amended complaint, the court will examine whether plaintiffs can make out a cause of action for a group boycott.

Essentially. the putative group boycott would be that defendants have conspired to boycott Durand's version of "Tilt." Not every concerted refusal to deal, however, rises to the level of a group boycott. See L. Sullivan, Antitrust, §§ 8-91 (1977). According to Sullivan, a per se boycott occurs when "traders at one level try to impede entry at that level; it is a way of creating or protecting (or attempting to create or protect) market power." Sullivan, supra at 257. Thus, a per se boycott is an "exclusionary practice," aimed at "depriving competitors of some needed resource, and thus making it harder for them to compete." Id. at 256.

It is patent that the facts alleged in plaintiffs' complaint cannot state a cause of action for a per se

illegal group boycott. By agreeing to exhibit one version of a motion picture and not another, the defendants cannot be said to have deprived Durand (even if he could be viewed as a competitor of defendants)[10] of some needed resource, or otherwise barricaded his entry into the motion picture distribution business. Thus, plaintiffs cannot state a claim for per se violation of Section 1.

a. Have plaintiffs stated a cause of action for a violation of Section 1 under a Rule of Reason analysis?

All agreements that are not per se illegal under the antitrust laws are analyzed under a rule of reason test. The elements of a cause of action for an unreasonable restraint of trade under the rule of reason analysis are:

"(1) An agreement among two or more persons or distinct business entities;

(2) Which is intended to harm or unreasonably restrain competition;

(3) And which actually causes injury to competition."

Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980).

A refusal to deal is invalid under a rule of reason analysis only if it threatens competitive injury in a relevant market. Here, it is hard to conceive how a decision by defendants to exhibit one version of a film and not another harmed competition in a relevant market. While defendants' activities may have been a breach of a contractual provision guaranteeing Durand creative control, they do not rise to a violation of Section 1. And while Durand himself may have been harmed, it strains credulity to see how competition in a relevant market has been impeded.

Gough v. Rossmoor Corp. offers strong support for dismissing this action on the pleadings:

> To amount to an unreasonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiff's business...As it has often been stated, "the antitrust laws* * * were enacted for 'the protection of competition, not competitors* * *'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S.Ct. 690, 697 (1977). The conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce on which the plaintiff is engaged. Gough v. Rossmoor Corp., 585 F.2d at 3860.

In the instant case, plaintiff Durand and the corporate entities associated with him are engaged in the field of commerce of producing, directing and scripting motion pictures. Plaintiffs' complaint does not show that defendants' actions have had an adverse impact on this field of commerce. Neither plaintiffs' first amended nor proposed second amended complaint states a cause of action under Section 1 of the Sherman Act. Therefore, this action must be dismissed unless federal jurisdiction can be predicated on the Lanham Act.

B. Have Plaintiffs Stated a Cause of Action Under the Lanham Act?

Plaintiffs' only other federal claim is under the Lanham Act. Specifically, plaintiffs charge that defendants violated § 43(a) of the Act, 15 U.S.C. § 1125(a),[11] which prohibits false designation of origin and false descriptions of goods.

Plaintiffs' Lanham Act allegations are found at ¶ ¶ 66-68 of their proposed Second Amended Complaint.[12] The gist of their Lanham Act claim is that the so-called "Warner version" of "Tilt" was falsely

designated as "Rudy Durand's Tilt." Second Amended Complaint ¶ 67(b).

There are several cases to support the proposition that a writer, director or other creative artist may maintain an action under Section 1125(a) if a book, movie or other work has been falsely designated as emanating from the artist.

In Jaeger v. American International Pictures, Inc., 330 F.Supp. 274 (S.D.N.Y. 1971), a director of a German film brought an action against the American distributor of the film. The plaintiff charged that the American verion of the film eliminated major parts of the original picture and that an additional segment had been inserted. The plaintiff alleged that these changes had distorted and mutilated his original production. Seeking redress under Section 1125(a), the plaintiff charged that the American distributor, by representing plaintiff as director and co-author of the allegedly distorted American version, had falsely designated goods in violation of the Lanham Act. Defendant, the American distributor, moved to dismiss. The district court denied the motion, stating:

> It is at least arguable that there is a claim under the Lanham Act, 15 U.S.C. § 1125(a), in the charge that defendant represents to the public that what the plaintiff had nothing to do with is the plaintiff's product.

Jaeger at 278.

In Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976), the British comedy group known as Monty Python brought an action against the television network, ABC, for violation of Section 1125(a). Monty Python had made three television programs that were shown in Britain by the British Broadcasting Company. Under the Monty Python-BBC agreement, BBC could make only minor changes in Monty Python's scripts without prior consultation with Monty Python. Nothing in the agreement allowed BBC to alter a program once it had been recorded. Id. at 17. BBC sold distribution rights to the Monty Python programs to Time-Life Films, which in turn entered into an agreement with ABC to broadcast the programs on American television. ABC broadcast the first of the three programs, editing out 24 minutes of the original 90 minute program. Upset by the editing, Monty Python brought suit against ABC for violation, inter alia, of the Lanham Act and for a

preliminary injunction to prevent ABC from airing the remaining two Monty Python programs. The district court denied the preliminary injunction. On appeal, the Second Circuit reversed. The Second Circuit found that "the edited version broadcast by ABC impaired the integrity of [Monty Python's] work and represented to the public as the product of appellants [Monty Python's] what was actually a mere caricature of their talents." Id. at 25. Hence, Monty Python had a valid cause of action under Section 1125(a). See also Follett v. New American Library, Inc., 497 F.Supp. 304, 313 (S.D.N.Y. 1980) (Section 1125(a) of the Lanham Act is designed to protect the public and the artist from misrepresentation of the artist's contribution to a finished work.)

Plaintiffs would be able to state a cause of action under the Lanham Act if their allegation was that defendants themselves had recut "Tilt" and then released it as "Rudy Durand's Tilt." However, the complaint itself clearly states that the (Warner version) was cut by Durand himself. Second Amended Complaint § 45. Thus, this case is distinguishable from Jaeger and

Gilliam where the changes in the works were made by others. Plaintiffs allege that Durand only made the changes demanded by Warner because his attorneys, Loeb and Loeb, wrongfully misadvised him that he was obligated to make these changes. However, even if it were true that Durand was fraudulently induced to cut "Tilt" to Warner's specifications, this would not give rise to a Lanham Act violation, since "Tilt" was not misdesignated as "Rudy Durand's Tilt." The movie was released as cut by Durand. Plaintiffs' only possible recourses are state law actions. Plaintiffs cannot state a federal claim under the facts they have presented to this court.

III.

CONCLUSION

For the reasons stated above, plaintiffs' first amended complaint is dismissed pursuant to Fed. R.

Civ. P. 12(b)(1). Plaintiffs' motion to amend is denied as futile. SO ORDERED.

DATE_____

/s/
Consuelo B. Marshall,
Judge
United States District
Court

FOOTNOTES

[1]The two other plaintiffs, Koala Productions and Rudy Durand Productions, Inc., are corporate entities associated with Durand.

[2]In addition to Simon Productions No. 2, Inc., Durand has named as defendants two corporate entities associated with Simon Productions No. 2, Inc. -- Simon Film Productions, Inc. and Melvin Simon Productions, Inc. -- and Melvin Simon, a shareholder and officer of the three defendant corporations. (Simon and the various Simon entities will be referred to hereinafter as "the Simon defendants.")

Durand has further named as defendants the Simon defendants' attorney, Richard B. Kaplan and Kaplan's law firm, Kaplan, Livingston, Goodwin, Berkowitz and Selvin (now defunct).

[3]Plaintiffs also name as defendants three Loeb and Loeb partners: Myron L. Slobodien, Leroy Bobbitt and John Frankenheimer.

[4]In their motion to dismiss, the Simon defendants, Richard B. Kaplan and Kaplan, Livingston, Goodwin, Berkowitz & Selvin state that there was a third cut made by Durand after the October, 1978, previews, and that it was this third cut that became the theatrically released version of "Tilt" that opened in April 1979. Motion to Dismiss First Amended Complaint at 5.

For purposes of the instant motions, it is irrelevant whether the theatrically released version of "Tilt" was a second or third cut.

[5]Durand sought a preliminary injunction from this court to enjoin NBC from exhibiting the "Warner version" of "Tilt." That injunction was denied.

[6]Plaintiffs' First Amended Complaint also included a Section 2 claim, 15 U.S.C. § 2, but the

Section 2 allegations have been dropped from the proposed Second Amended Complaint. For reasons explained in Part IIA, infra, the analysis in this opinion will be principally directed to plaintiffs' proposed Second Amended Complaint.

[7]Federal jurisdiction cannot be predicated on 28 U.S.C. § 1332 because there is not complete diversity of citizenship between plaintiffs and defendants.

[8]Although the court's analysis herein is directed principally to the proposed Second Amended Complaint, the court has examined both the First and the Second Amended Complaints and finds that neither raise any federal questions.

In actuality, the First Amended Complaint and the proposed Second Amended Complaint do not differ significantly. The only differences of note are that the Second Amended Complaint drops the Sherman Act § 2 allegations, see n. 6, supra, and allegations of a group boycott. See n. 9, infra.

[9]In the First Amended Complaint, plaintiffs alleged that the conspiracy constituted a group boycott. First Amended Complaint ¶ 102(c). There is no such allegation in the Second Amended Complaint.

[10]It is hard to conceive how Durand and defendants could be competitors. Durand is in the business of writing, producing and directing films. He is not in the distribution business. He does not seek to enter the distribution business, but rather to have defendant distributors distribute a particular version of his film. Cf. Austin v. House of Vision, Inc., 404 F.2d 401, 403 (7th Cir. 1968) ("The trustees, as such were not engaged in the optical business and much less were not competitors of defendant. There was no allegation of conspiracy in restraint of trade among competitors, the proscription of which is contemplated by Section 1 of the Sherman Act.")

[11]See Gough v. Rossmoor Corp., 585 F.2d 381, 385 (9th Cir. 1978), cert. denied, 440 U.S. 936

(1979). ("Unless the alleged anticompetitive conduct is per se unreasonable, the fact that the conduct restrained trade in a relevant market is an essential part of plaintiff's case").

[12]As in the case of plaintiffs' Sherman Act claim, plaintiffs' Lanham Act allegations in the proposed Second Amended Complaint do not differ significantly from the Lanham Act allegations in the First Amended Complaint.

The court finds that neither the First or Second Amended complaints state a cause of action under the Lanham Act. See infra.

APPENDIX

D. Decision of United States Court of Appeals for the Ninth Circuit, dated June 8, 1984, affirming on the basis of F.R.C.P. 12(b)(6) or 56, the dismissal with prejudice of First Amended Complaint.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUDY DURAND and KOALA PRODUCTIONS, LIMITED,	)	
Appellants,	)	
vs.	)	CA No. 83-6113
SIMON PRODUCTIONS NO. 2, INC.; SIMON FILM PRODUCTIONS, INC.; MELVIN SIMON PRODUCTIONS, INC.; MELVIN SIMON; NATIONAL BROADCASTING COMPANY, INC.; WARNER BROS., INC.; VIACOM INTERNATIONAL, INC.; MYRON L. SLOBODIEN; LEROY BOBBITT; LOEB & LOEB; JOHN FRANKENHEIMER; RICHARD B. KAPLAN; AND KAPLAN, LIVINGSTON, GOODWIN, BERKOWITZ & SELVIN,	)	DC No. CV 81-1320-CBM
Appellees.	)	MEMORANDUM**

**The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

Appeal from the United States District Court
for the Central District of California
Hon. Consuelo B. Marshall, District Judge,
Presiding
Argued and submitted March 8, 1984

Before: SNEED and BOOCHEVER, Circuit Judges, and SOLOMON,* District Judge

Rudy Durand,[1] appellant, brought this action against Melvin Simon, Simon's affiliated companies, National Broadcasting Company, Inc. (NBC), Warner Brothers, Inc., Viacom International, Inc., and his attorneys. The district court dismissed the action under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Durand appeals.

Facts

Durand entered into a contract with Simon to sell his rights to a motion picture screenplay entitled "Tilt."

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]The other two appellants, Koala Productions, Ltd. and Rudy Durand Productions, Ltd., are corporations associated with and controlled by Durand. Appellants will be collectively referred to as Durand. Simon and his affiliated companies will be collectively referred to as Simon.

Under the contract, dated May 24, 1977, Simon agreed to finance the direction and production of the film and all distribution agreements. Durand was to produce, direct, cast, and select the support personnel and to retain absolute "creative rights" of the final version of Tilt. These rights include the right to cause the picture to be fully cut and finally edited, the right to make final decisions concerning all creative matters in the picture's production, such as editing, the right to prepare an unobstructed first cut of the picture, the right to prepare additional cuts of the picture as desired by him, and the right to prepare the picture unfettered by others. The contract also gave Durand possessory credit before the title of the film. It would read "Rudy Durand's Tilt." Durand was to lose his final cut authority only if Simon sold the film's full distribution rights.

In September, 1978, Simon closed Durand's cutting rooms. Simon explained that Warner Brothers, Inc. had acquired all the domestic distribution rights to Tilt and that Warner Bros. chose to exercise its right to control the final cut. Durand's attorneys and Simon both

advised Durand that he was required to make the cuts that Warner Bros. demanded. Following this advice, Durand made the cuts and produced the "Warner" version of Tilt. Although Durand alleges that he made the cuts and produced it under protest, he assisted in advertising and marketing the film. A test release of the Warner version was unsuccessful.

After the Warner version was released, Durand learned that Warner Bros. had not acquired full distribution rights to Tilt. He learned that Simon had only contracted to distribute Tilt under the Warner Bros. name. Under the Simon-Durand contract, Durand's final cut rights were still intact. Durand demanded his right to make these final cuts, and Simon acceded to these demands. Durand then produced another version of Tilt -- the "Durand" version. A test release of the Durand version was also unsuccessful.

After the Warner version was completed, Simon entered into agreements with NBC and Viacom International, Inc. to broadcast Tilt. Viacom broadcast the Warner version of Tilt on cable television in October, 1980, and NBC broadcast the Warner version in

October, 1981 and in April, 1982. Before their broadcasts, both NBC and Viacom knew that the Durand version was available.

Durand brought this action without an attorney. He alleged violations of section 1 of the Sherman Act, 15 U.S.C. § 1, section 43 of the Lanham Act, 15 U.S.C. § 1125(a), and various state claims.[2] The case was assigned to Judge Consuelo B. Marshall. During the proceedings, Durand moved on two occasions to disqualify Judge Marshall. Other judges in the district denied both requests, and we affirmed.

Before appellees filed a responsive pleading, Durand amended his complaint to join his attorneys in the contract negotiations as defendants. All defendants moved either to dismiss the amended complaint or to strike certain allegations. Durand sought leave to file a second amended complaint and to require the defendants to produce certain documents. After oral argument, the district court dismissed the action for lack of

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[2]These state claims include: breach of contract, fraud, contractual interference, conversion, invasion of privacy, promissory estoppel, conspiracy, and an accounting.

subject matter jurisdiction. The court denied Durand's motion to file a second amended complaint as futile. Durand appealed.

In this appeal, Durand asserts that the district court (1) erred in dismissing his Lanham Act claim; (2) abused its discretion in denying his request to file a second amended complaint; and (3) erred in dismissing the action without giving him the privilege of filing a third amended complaint. Durand also asks that Judge Marshall be disqualified from the case if this court reverses and remands the case to the district court.

Discussion

The district court dismissed this action for lack of subject matter jurisdiction. The court, however, considered the merits of Durand's Lanham Act claim and should have evaluated the claim under Rule 12(b)(6) -- failure to state a claim, or Rule 56 -- motion for summary judgment. This is not reversible error because this court can affirm on any basis presented in the record. Mollnow v. Carlton, 716 F.2d 627, 628 n.1 (9th Cir. 1983), cert. denied, 52 U.S.L.W. 3687 (March 19,

1984). There is ample evidence to dismiss Durand's action under Rule 12(b)(6) or Rule 56.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prohibits the use of false designations of origin and false descriptions in the advertising and sale of goods and services.[3] To state a claim under section 43, Durand must show that Simon either falsely designated the origin of Tilt or falsely described Tilt to the public. Durand has not made that showing, and the

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[3]Section 1125(a) provides:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

cases on which he relies do not support his position. In Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976) and Jaeger v. American International Pictures, Inc., 330 F.Supp. 274 (S.D.N.Y. 1971), the defendants altered the artist's work without his permission and then falsely presented the altered work to the public as the artist's own. That is not the case here. Durand edited, and his talent was the origin of both versions of Tilt. Furthermore, Durand advertised, promoted, and helped to distribute the Warner version. Durand represented it as his own to the public, and he did not object until the film failed and he discovered that he still retained final cut authority. There is no violation of the Lanham Act. Durand may have a remedy under state law, but he failed to make the required showing under the Lanham Act.

The district court properly denied Durand's request to file his second amended complaint on the ground of futility. Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1085 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977). All the parties acknowl-

edge that the second amended complaint only reorganized the arguments in the first amended complaint; the facts alleged are the same. Under Rule 15(a) of the Federal Rules of Civil Procedure, it is within the discretion of the trial court to allow parties to amend their pleadings. The district court did not abuse that discretion.

Durand also challenges the district courts failure to permit him to file a third amended complaint before it dismissed the action. We do not see how the complaint could have been amended to state a successful Lanham Act claim. Durand failed to submit any additional facts which if considered would have changed the outcome of this case. The district court did not err in refusing to allow Durand to amend his complaint a third time.

AFFIRMED.

APPENDIX

E. Order of United States Court of Appeals for the Ninth Circuit, dated August 2, 1984, denying rehearing en banc.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUDY DURAND and KOALA PRODUCTIONS, LIMITED, Appellant, v. SIMON PRODUCTIONS NO. 2, INC.; et al., Appellees.	)	No. 83-6113 ORDER

Befor: SNEED and BOOCHEVER, Circuit Judges, and SOLOMON,* District Judge.

Appellants' motion to file the petition for rehearing with suggestion for rehearing en banc is granted.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX

F. Reply Memorandum of Rudy Durand against Local Rule 1 of the Central District of California, filed July 31, 1981, in the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RUDY DURAND, et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, SIMON PRODUCTIONS, NO. 2, et al., Real Parties in Interest	CASE NO. 81-7288 REPLY MEMORANDUM OF RUDY DURAND AGAINST LOCAL RULE 1 OF THE CENTRAL DISTRICT OF CALIFORNIA.

RUDY DURAND submits this memorandum against the validity of Local Rule 1 of the U.S. District Court for the Central District of California.

Local Rule 1 as it applies to these unique facts and circumstances of this case is unconstitutional in that it is impermissably vague or that it has been abused in this case in such a way as to deny me rights guaranteed by the U.S. Constitution and prevented me from complying with obligations imposed on me by law,

particularly 28 U.S.C. 1654. Local Rule 1 is designed to protect and preserve, without any valid reason whatsoever, the invidious concentration of power held by the Local lords and barons of the legal community in Los Angeles and it does so by applying a uniquely local favortism contrary to what is supposed to be a national standard.

Late last year, when I began to realize that my attorneys at Loeb and Loeb had been sacrificing my interests and the interests of my small corporations to their own personal reputation and profits so that they could better serve the interests of other more powerful clients, namely Melvin Simon and the Simon companies, I began to look for a dedicated and devoted counsel to assist me in examining my case and possibly filing a lawsuit. Fifteen years of experience in the entertainment services had taught me that the major entertainment law firms in the Los Angeles area would not give to me the kind of legal help I needed because I would be up against either their client or major powers in the industry whom they would not wish to offend. All these law firms and the major powers in the industry were so

intertwined and involved with one another that not one of them could give me the kind of representation I wanted, so I sought outside help.

I sought out Richard Haynes of Houston, Texas, and explained to him my problem. We tried to come up with a lawyer who would be available in Los Angeles, who was not involved with the industry but who was very knowledgeable about law, who would not be coerced or intimidated by powerful opposition, who would not place himself in a conflict of interests, and who would understand the case and handle his role as collaborater with me in a responsible, professional manner. Mr. Haynes recommended Jim Ortego. Mr. Ortego accepted the offer, conditioned on approval by the local court, which we all expected to be an automatic courtesy, since he was obviously qualified and was taking the next California bar examination.

After explaining to Professor Ortego the details of my case, he agreed that I should represent myself and that he would serve as legal counsel for the corporate plaintiffs. His role, which he accepted partly because he felt a responsibility to expose corruption in

his own profession, was always agreed to be that of a ~~collaborator~~ with me in the case. He respected my decision to appear pro per and he devoted himself to the case by working along with me 30 to 40 hours a week for several months in planning out and implementing the strategy and legal thrust of my case. He associated a young and inexperienced local counsel, John McKenna, so that a member of the California bar would appear on all official court records and approve and stand behind our pre-lawsuit correspondence. Professor Ortego was exactly the kind of devoted and dedicated attorney I was looking for and he served in that capacity until he was illegally and improperly dismissed from the case.

Once the case was filed, we began to experience the kind of conduct that I had thought would frighten away a local counsel from this case. Judge Marshall's clerk, as I have discussed fully in other documents, was extremely biased in her attitude towards me and Mr. Ortego and, have the Judge rubber stamp her clerk's own decisions. Local rules were applied strictly against me and my attorneys, but were ignored when it helped

my powerful opposition. The Court refused to set any of my motions for hearing, not even the motion to have Jim Ortego reinstated, even though his removal left me unable to proceed with the case. Docket entries were either not made or made weeks after the documents and submissions were made. The Court followed improper procedures in dealing with my affidavits for removal or disqualification of Judge Marshall, motions and other submissions I made were either lost by the clerk's office or held by the Judge for weeks so that they could not go onto the record. I was forced to attend a deposition while a stay had been ordered by the court, and forced to appear at a hearing without benefit of co-counsel and after I had applied to this Court for writs of mandamus and/or prohibition. Most of these events took place after Jim Ortego was improperly and illegally removed from the case and I was acting pro per for myself while my corporations were without effective counsel. (See Exhibit "C" for details.)

When Judge Marshall removed Jim Ortego as counsel for corporate plaintiffs the only basis she

referred to was Local Rule 1, a home town rule that denies the practice of law to residents of California, even though she was fully informed of Jim Ortego's residence in California before she approved his pro hac vice application. In other words, but for Local Rule 1 we probably would not be here today.

The Los Angeles County Bar Association has filed an amicus in this case, but they have apparently misinterpreted the Court's request for an analysis of the rule as is applies to this case on the record as a whole, and have either intentionally or negligently refused to consider the unique facts and circumstances of this case. We have cocperated fully with them and offered our assistance in preparing the amicus, though they have not used it any way. Professor Ortego's letter to them made it clear that we viewed Local Rule 1 as a tool in this case, a tool being used to protect the vested powers of the Local Bar Association, but they totally ignore this facet of the rule in their amicus. (Exhibit "D"). They seem to think every issue concerning the rule involved only the isolated question of a first admission of an attorney pro hac vice and ignore the

fact that Professor Ortego was first admitted to practice in this case and then removed after thirty days of collaborating as co-counsel with me and, in addition, they totally ignore the effect of his removal on my rights, which is the real issue in this case.

The application of Local Rule 1 in this case improperly, illegally and unconstitutionally interferes with my rights by keeping me from complying with the law that says I cannot appear in court and go forward with my own case unless the corporate plaintiffs are represented by an attorney. Even the Los Angeles County Bar, in its amicus, concedes that the application of the rule can result in unfairness in a particular case (Amicus memorandum at p. 171, '81), depending on the circumstances.

In the absence of case law my case presents a unique circumstance entangled with constitutional questions wherein a local rule interferes with my constitutional right to appear for myself and at the same time prevents me from complying with federal statute law and, in these circumstances, the rule should be rescinded.

Quoting the amicus of the Los Angeles County Bar: "There can be no question that the district Court has the statutory authority to promulgate reasonable rules governing the admission of attorneys to practice before the Court." (Amicus, memorandum at p. 61.11). Professor Ortego was and is the attorney for the corporate plaintiffs because I am obligated by law to have an attorney represent the corporations before I can be cleared to proceed with my own case. 28 U.S.C. 1654 denies me the right to proceed without an attorney for the corporate plaintiffs and Local Rule 1 as applied in this case, denies me the right to continue to retain the attorney of my choice as a collaborator who can represent the corporate plaintiffs so I can comply with the law.

The Los Angeles County Bar Association takes the position that the language in Local Rule 1 is consistent with and authorized by 28 U.S.C. 1654. They are saying that Local Rule 1 permits a court to refuse a pro hac vice attorney who is a resident of California and who comes before the Court and asks to "manage and conduct" causes. Professor Ortego was never asked by

me to "manage and conduct" causes. Professor Ortego was never asked by me to "manage and conduct" this case and we have made it clear in all our pleadings that I am appearing pro per on behalf of myself and that Professor Ortego has always worked as a collaborator with me in this case.

Local Rule 1, despite what is said by the Los Angeles County Bar, is not consistent with 28 U.S.C. 1654 because it denies the right to lawyers to "appear and participate", not just "manage and conduct." If 28 U.S.C. 1654 said "appear and participate" then the Los Angeles County Bar Association would be right, but it doesn't say that. In this cause of action Jim Ortego was not managing and conducting the causes of action but he was attempting to appear and participate as a collaborator counsel with a pro per plaintiff. He has not, is not, and will not manage and conduct the cause.

The Los Angeles County Bar Association was fully familiar with all the aspects of this unique case. They requested and received from this Court an extension of time to file their amicus so that they could fully, legally apprise themselves of the record as a whole.

They were completely familiar with all the circumstances in this case, they had to know and must have known they were walking on constitutionally thin ice, but speaking through O'Melveny and Myers, they ignored the unique circumstances of this case and based their whole argument on an attorney's rights while totally ignoring mine because in my belief, they wanted to protect themselves and other local attorneys in the monopoly they hold on the practice of law in the Los Angeles federal court. Unfortunately the local legal environment of lawyers in Los Angeles' entertainment industry is very small, dominated by a handful of major law firms who represent the rich and powerful, and operates in an atmosphere where conflict of interest is called "packaging."

The powerful law firm speaking for the Los Angeles County Bar admit this rule is not the wisest and that it could result in injustice in certain cases but they either intentionally or otherwise misdirected the question of law involved here. It is not only whether or not Jim Ortego's rights were violated, but what of my constitutional rights?

Local attorneys and judges got together and passed a rule which in these circumstances denies me the right to comply with the law so that I can appear for myself and go forward with my case, which is a constitutional right, along with a collaborating attorney of my choice whom I can completely trust and believe in because he is not involved or tainted by any relationship with any of the law firms who comprise the concentration of power in the entertainment industry in the Los Angeles area. In these facts and circumstances local attorneys and judges have come up with a set of rules that are not consistent with federal law or the Constitution. The local rules cannot deny a citizen the right to manage and conduct his own case so long as he complies not with the constitution or local rules, but with the law. The law says in order for me to do so I have to bring in someone to speak for the corporation. And why am I doing it in this instance? I am doing it to conform with the requirements of law, because the law demands it of me. This local rule denies me that right since Mr. Ortego was illegally and improperly taken out of the case after first being admitted. Had he been

originally denied, another question of law would be involved, but in this case he was approved by the Court after being fully informed both in pleadings and in telephone conversations with the judge's clerk, of his residence and employment in California and appeared in Court and prepared papers without objection from anyone. His admission made me legal and allowed me to proceed to manage and conduct my case for 30 days. When he was illegally removed I was made illegal, too. I could no longer proceed with my case and I was forced to seek help from this Court. Thats how the local rule damaged me and took away rights guaranteed by the Constitution. Professor Ortego was removed on only one stated ground: Local Rule 1.

This is a unique and extraordinary set of circumstances and I believe the Court did not have the authority to apply the local rule as it purports to have done in this case because either the local rule is illegal because it either violates my constitutional and statutory rights or is impermissably vague under the constitution in this case.

In these circumstances the local rule should be rewritten so that it will comply with federal law, especially the Constitution and 28 U.S.C. 1654 and it should not be written so as to mirror the California state rule for admission of attorneys pro hac vice to protect the lords and barons of the legal community in Los Angeles. It should be rewritten so that the language in 28 U.S.C. 1654 can be relied upon by citizens seeking their day in court so that an attorney resident in California, who can practice in the federal courts in the Northern District of California and before the Ninth Circuit Court of Appeals cannot be denied the right to "appear and participate" in the federal court in the Los Angeles district and so that a citizen appearing pro per will not be denied his constitutional rights to proceed with his own case with a collaborating attorney of his choice.

Without Jim Ortego's presence in my case I have not been allowed to go forward with my case. This fact has been fully set out before both this Court and the court below in numerous documents and submissions. I have been forced to appear at a deposition which would

necessarily include numerous questions concerning the corporate plaintiffs and even though I made this known to Kaplan, Livingston, the attorneys for the original defendants, they required me to appear for the deposition, which I did, and I read into the record my constitutionally based objections to the procedure, including the fact that under 28 U.S.C. 1654 I could not proceed without a collaborating attorney for my corporations. (Exhibit "A".) Later, Magistrate Geffen imposed costs on me for attempting to exercise these rights, berated local counsel of record for the corporation plaintiffs, who was not, had not been, and could not be lead counsel for the corporation, and, in my view, improperly and illegally forced me to proceed with the hearing without benefit of co-counsel of my choice and improperly interferred with my constitutional right to represent myself. (Exhibit "B" at p. 30, et seq.)

In denying me the right to have Jim Ortego as a collaborator, the court has taken away from me the assistance of an attorney whom I have worked with many months and mutually developed a working relationship for this case. He is and was my choice of

attorney because I trust him, because we work well together, and because I know he is committed to utilize the full force and effect of the law and rules available to me in this case. I am secure and confident with a devoted, dedicated and trustworthy attorney. I know that I could not obtain this quality of legal representation from a local counsel. My own experience in trying to seek out other counsel has vividly illustrated to me the pressure exerted on local counsel to play along with the system. All of the attorneys I spoke with were reluctant to file suit against other law firms and major powers in the industry and not one of them was willing to seek the removal of a federal judge.

I believe I am entitled to the best justice the Court can give me and that my choice of colloborating counsel should be respected. To force me now to have to try and find an experienced entertainment lawyer to collaborate with me will dangerously dilute the quality of justice in the federal court. Local Rule 1 does not

confer authority and no court has the right to take constitutional rights away from me.

Dated: July 31, 1981

Respectfully submitted,

/s/_____
Rudy Durand
Petitioner
361 N. Canon Drive
Beverly Hills, CA 90210

APPENDIX

G. Affidavit of Rudy Durand, filed August 19, 1981, in the United States Court of Appeals for the Ninth Circuit in support of Emergency Motions.

AFFIDAVIT OF RUDY DURAND

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

"No special interests should be above the law of the land." This statement represents President Reagan's recent position in a widely publicized dispute. The present administration's position to the world and to every citizen of the United States should once again make us proud of what this country stands for. This Court, which shares with the President the special duty of enforcing the law of the land and is the Court of the People has been extremely sensitive and has even-handedly exercised its judicial authority in this complex case in which powerful local special interest groups are aligned against a relatively powerless pro per plaintiff and two small corporations, special interest groups which have shown no regard to the law, for federal rules, or for the Orders of this Court.

Each and every submission that I have made on the Record was necessary to protect myself and my small corporations from the concentration of legal

resources, economic and industry powers held by my powerful opposition. I have tried in every way possible to extricate myself from the morass of legal complexities created by my opposition to avoid reaching the substantive issues in this case. Why should the substantive aspects and the merits of this case be buried beneath the procedural and technical machinations of the lower court in combination with the most powerful law firms and special interest in the entertainment industry?

It is incredible to me that our system can be so manipulated monopolized procedurally that the merits and the substance of the major antitrust and Lanham Act action can be mired completely and where a pro per plaintiff and a pro hac vice attorney can be separated from and denied the right to be heard in a court of law.

Because of the lower court's abuse and disregard for my constitutional rights by being prejudiced and bias against me, I was forced to apply to this Court for relief under a writ of mandamus. Official court documents in the lower court, which are now part of the

Record in this Court, will prove beyond any doubt that I tried to avail myself to the lower court with motions as the law requires of me to clarify the legalese labyrinth puzzle that the lower court created for me and my chosen collaborator acting as pro hac vice for my corporations. Many of my motions when filed in the lower court and this Court were described as my legal opponents through Mr. Bergman in their court documents as frivolous illusions of persecution, and the product of a disturbed personality. Now that the legal dust has begun to settle I appear to have been a legal soothsayer because everything that my experience in the industry taught me might happen has come to pass. My powerful opponents headed by Michael Bergman, the attorney for Real Parties in Interest, and also his law firm, a defendant in this case has engaged in the unethical practices I knew they would.

My statements herein and throughout the submissions before this Court are based on the Record and delivered under oath and substantiated by hard evidence. There have been no responses, no denials, and no objections by the other side as they are continuing to

try to avoid, interfere with, and improperly obstruct our efforts to bring the merits ad issues of this case before the Court. It becomes critical under the foregoing circumstances that these issues be brought before this Court and made a part of the Record.

This Court has previously been made aware through formal documents of the arrogance and illusions that Mr. Bergman, attorneys for Real Parties in Interest, has displayed from the onset of this case and continues to do so by cleverly and cutely insulting the intelligence of this Court and myself. He operates as if he wields the power to seemingly have the influence and the ear of the Central District Court in Los Angeles. They write personal congratulatory letters to the trial judge in violation of local rules and standards of ethical practice, they defame me in pleadings in this Court, they ignore local and federal rules in their submissions and still get the relief they seek in their submissions to the lower court. They fail to address or describe as frivolous or as "stream of consciousness abuse, without a scintilla of truth" my serious allegation of wrongdoing substantiated by hard documentary

evidence, they file oral motions without warning or notice to me and the court gives them the relief asked for while refusing to set any of my motions for hearing, even though they are unopposed, and they use their personal influence with the trial judge to have her violate her own stay order so that their motions to dismiss could be heard and decided in their favor before this Court reaches a decision of the issues before it, thus preventing any possible judgment which might be embarrassing either to them or to the lower court judge, and in complete disregard of all of my motions which were filed previous to their motions to dismiss and which the court at first refused to let me file and later refused to set for hearing, are blatant and deliberate disregard of my constitutional rights.

Obviously because of pressures from the Los Angeles County Bar Association and other law firms who now find themselves involved in a legal constitutional war with this Court threatening their monopoly and misuse of Local Rule 1 and because a concern that this Court may destroy their home town rule, Mr. Bergman again, not on the court record, but with a

personal letter to me, has tried to draw me into a concantenation of legal issues and to lure me into stipulating so as to have us appear in the lower court, not because of the "urgent" matter contained in his correspondence relating to my film but in order to lure me and deceive me into collarborating with him to destroy this Court's jurisdiction.

On June 12, 1981 Mr. Bergman's acknowledgement and full understanding of the stay and the lower court agreed that there was to be no action in the lower court until my writ was adjudicated here and, in the same submission, trying to impress this Court with his arrogance, reminded the court that his motion to dismiss would be the first motion to be heard in the lower court, without regard to my constitutional rights to have my previously filed motions heard first.

I would like to remind the Court this letter was a carefully thought out legal maneuver that had nothing to do with Mr. Bergman's client NBC or the issues of my case but rather was a legal ploy designed to keep the Ninth Circuit Court from ruling on the validity of

Local Rule 1 and to avoid embarrassment to Mr. Bergman and his law firm and to the trial judge.

Mr. Bergman's July 31 letter to me (Exhibit B) has once again deliberately mischaracterized the court record as a whole. Mr. Bergman's statement that "since all moving and responsive papers in connection with that motion have been filed" again mischaracterizes the court record. Mr. Bergman knows full well that plaintiffs have been deprived of discovery and the opportunity to reply to defendants answer to the motion because of the illegal removal of co-counsel six (6) days before the scheduled hearing on the motion, because of numerous stay orders in the lower court, and because I have been unable to proceed in this case because of federal law requiring co-counsel for my corporation to be with me.

Mr. Bergman's letter also in very careful wording indicates that NBC "intends" to broadcast the illegal version of my film on primetime network television in September 1981. His letter indicates that I am being made aware at the "earliest opportunity" of the alleged airing of the film and emphasizes the urgency of the

situation. To the best of my knowledge, a film that is to be broadcast on primetime network television would have been scheduled for broadcast many months prior to September of 1981 and not just one month prior to airing. Inconsistently with the supposed urgency Mr. Bergman in his letter does not indicate a specific date or time slot that NBC "intends" to broadcast the illegal and contractually unauthorized version of the film. The legal question of whether or not NBC or anyone else can exhibit the unauthorized version is one of the main reasons that I am in federal court. By threatening me to illegally air the unauthorized version and thereby change the status quo Mr. Bergman was hoping that I would react emotionally to his threat and fall into his well thought out trap and consent to a waiver of this Court's jurisdiction.

On November 11, 1980 I informed NBC that the only version of the film that could be aired would be my contractually authorized final cut. (Exhibit E). If NBC acquiesces to Mr. Bergman's recent ploy NBC stands to lose the protection of the "hold harmless" clause given to NBC by another defendant-client of Mr. Bergman,

Simon Productions No. 2. Mr. Bergman is representing so many clients who have so many different interests and complicated contractual relations, each dependent upon the other, that NBC may lose some of its rights by acquiescing to Mr. Bergman's ploy, for the benefit of Mr. Simon, another client of Mr. Bergman.

I, too, have found it difficult economically and in terms of loss of earning power because of having to spend 100% of my time in this case and would like to help the Court resolve one of the many motions before the Court, namely the Preliminary Injunction. Before I request the Preliminary Injunction to be heard before this Court, which would be practical because this is the only court with jurisdiction over the case and because there is no present stay in this Court and because my co-counsel is licensed to practice before this Court, I am applying under F.R.A.P. 2 and 33 to have this Court hear and determine whether in fact an emergency exists in this case. Mr. Bergman has stipulated that he would consent to having the Motion heard by "any judge".

I want to make it clear to this Court that I will take no action that might disturb the adjudication of my writ and the constitutional question of Local Rule 1 in this Court. Therefore, I am relying on F.R.A.P. 2 and 33 and respectfully requesting an Emergency Hearing to clarify issues before oral argument and to determine if in fact an emergency exists under the unique circumstances of this case.

Although I am not of the legal profession, but because of the unique opportunity that the constitution has allowed me to prosecute my case, I have tried to prepare my legal position and defenses by acquainting myself with the law and its proper use. I am reminded King Henry II in 1154 and his attempt to apply common law based on the Constitution of Clarendon. King Henry's application of common law was designed to provide the "best justice" for the common man, that soon after his application of the rights of the common man to seek the "best justice" in the King's Court and the determination to curb baronial independence by local magnates who found ways to circumvent the common law and the King's justice by instituting re-

gional laws, local rules, and shrewdly composed local form and custom. These local forms continually interfered with the spirit and the basis of King Henry's approach to the common law. This inteference by the seigniorial powers, local magnates, continued throughout King Henry's reign and severely interfered with the King's new principles of law in order to reapply outdated customs and forms.

800 years later I find after having availed myself of extreme and unusual remedies under the law and after having exhausted practically all the statutory authorities as well as the federal rules available to me under the law that the issues remain clouded. I still face a web of complexities deliberately established by a major law firm representing my opponents, a law firm that is itself a defendant in this case. I also find as adversarys the powerful Los Angeles County Bar Association not to mention officials of the lower court, who are now combined and arrayed against me in support of a local form, a local custom, which translate into Local Rule 1. This combination has entangled and overridden the substantive aspects and the merits of my

case, leaving me in a position where no balancing powers are present on my side of the issues which in any way compare with the concentration of legal resources, economic and industry power in opposition against me.

I believe this Court has the opportunity and the right to undo a great constitutional wrong, a wrong that has become a part of the system, all having to do with the law that the court itself created and that already has been subject to reinterpretation by this Court. This Court has overturned the lower court in its position to sustain the validity of the rule and now finds itself once again asking the lower court and the Los Angeles County Bar Association to respond to the question or the premise that procedurally and technically the power is in the hand of the officers of the lower court. The local bar association, and the state bar association and the courts themselves have woven procedurally and technically a morass of complexities that has become a part of the system where the individual, especially the party plaintiff has to experience a species of death

before ever reaching that point in time where his case can be heard on the merits.

This is an example of the deterioration of the system which occurs when the power of the law and the affect of the law is not in the hands of the people but has been returned to the lords and barons of industry and of the bar association itself and of judges who have replaced the local magnates who interfered with the spirit and purpose of the common law when it was first established in England centuries ago.

Because of the foregoing circumstances it has become critical that these issues be brought before this Court through these Emergency Motions and made a part of the record so that there may be a fair adjudication of these issues and no further applications need be made.

I declare under penalty of perjury that the above facts are within my personal knowledge and that if

sworn as a witness I could and would competently testify to such facts.

Executed on August 19, 1981 at Beverly Hills, California.

/s/
RUDY DURAND

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

On August 19, 1981 before me the undersigned a Notary Public in and for the said State, personally appeared RUDY DURAND, known to me to be the person whose name is subscribed to the above instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

/s/
CHERYL L. KING
NOTARY PUBLIC IN AND
FOR SAID STATE

No. 84-843 (2)

Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RUDY DURAND AND KOALA PRODUCTIONS, LIMITED,
Petitioners,

v.

SIMON PRODUCTIONS NO. 2, INC., SIMON FILM PRODUCTIONS, INC., MELVIN SIMON PRODUCTIONS, INC., MELVIN SIMON, NATIONAL BROADCASTING COMPANY, INC., WARNER BROS. INC., VIACOM INTERNATIONAL, INC., MYRON L. SLOBODIEN, LEROY BOBBITT, LOEB & LOEB, JOHN FRANKENHEIMER, RICHARD B. KAPLAN AND KAPLAN, LIVINGSTON, GOODWIN, BERKOWITZ & SELVIN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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January 14, 1985 **Counsel of Record*

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court review the determination of the Central District of California, as affirmed by the Ninth Circuit, that Petitioners failed to allege a violation of the Lanham Act?

2. Is there a Constitutional right to be represented *pro hac vice* by an out-of-state attorney who does not meet the local standards for such representation?

   (a) Should Petitioners be permitted to raise this issue in this Court when they have neglected to properly raise it either before the Ninth Circuit or the District Court?

COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

The crux of Petitioners'[1] Lanham Act claim is that since 1979 Respondents[2] have conspired in the exploitation of one version of the motion picture entitled Rudy Durand's "Tilt", which version Durand edited according to some of Respondents' requests (hereinafter the "Release version"), rather than another version which he edited according to his own taste. At the time of its original distribution, Durand publicly claimed full credit for the Release version and actively

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[1]Rudy Durand and Koala Productions, Ltd., (hereinafter collectively referred to as "Petitioners").

[2]Simon Productions No. 2, Inc., Simon Film Productions, Inc., Melvin Simon Productions, Inc., Melvin Simon, National Broadcasting Company, Inc., Warner Bros. Inc., Viacom International, Inc., Myron L. Slobodien, Leroy Bobbitt, Loeb & Loeb, John Frankenheimer, Richard B. Kaplan and Kaplan, Livingston, Goodwin, Berkowitz & Selvin (hereinafter collectively referred to as "Respondents").

The listing of parent corporations and subsidiaries for compliance with Rule 28.1 appears on the inside back cover of this brief.

assisted in its marketing. Petitioners now claim that the use of Durand's name in conjunction with the title constitutes a false representation even though he wrote, directed, produced and edited the motion picture.

The Central District of California dismissed Petitioners' first amended complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and denied Petitioners leave to file a proposed second amended complaint on the ground of futility. The Ninth Circuit affirmed. Petitioners do not claim that either of these courts misinterpreted the law or misunderstood the facts of this case. Indeed, there is no conflict between the law as applied by either the District Court or the Ninth Circuit and the law as applied in any other reported decision. Nor do Petitioners claim that this case presents any question of importance to anyone other than themselves. Petitioners merely seek another avenue of appeal from the decision of the Central District.[3]

Petitioners also ask this Court to create a new Constitutional right—the right of a lawyer admitted in one state to appear before a federal district court situated in another state. Petitioners claim that the Central District of California violated the Due Process Clause when it denied James Ortego permission to appear *pro hac vice* on behalf of Koala Productions, Limited—even though Ortego clearly did not satisfy the Local Rule governing such an appearance in that district. This Court has already held that there is no Constitutional right to appear *pro hac vice* and that hence the Due Process Clause does not apply to this privilege. *Leis v. Flynt*, 439 U.S. 438 (1979), *reh'g denied*, 441 U.S. 956 (1979). Moreover, Petitioners did not raise this constitutionality issue in either the Central District or in any of their appearances before the Ninth Circuit and should not be permitted to raise it here.

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[3]For this reason, unfortunately, Respondents must address the merits of the case in order to adequately respond to the petition.

B. Nature of the Case and Course of Proceedings.

Petitioners filed their original complaint on March 18, 1981 and their first amended complaint on May 4, 1981. Respondents moved to dismiss the first amended complaint on May 27, 1981. During the course of Petitioners' efforts in the Ninth Circuit to have Mr. Ortego admitted *pro hac vice* and various judges of the Central District disqualified, a stay of proceedings was in effect. Before the District Court ruled on Respondents' motions to dismiss, Petitioners moved for leave to file a second amended complaint.

On June 30, 1983, the District Court dismissed the first amended complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and denied Petitioners' motion for leave to file a second amended complaint on the ground that to do so would be futile as it also failed to allege a Lanham Act violation. Even though it gave Durand the benefit of directing its analysis principally to the "improved" proposed second amended complaint, the District Court found "[t]hat neither raise any federal questions."

The Ninth Circuit affirmed the District Court's decision. Though the Ninth Circuit faulted the District Court for dismissing the first amended complaint under Rule 12(b)(1) after considering the merits, the appellate court found "ample evidence" to dismiss Petitioners' action under Rule 12(b)(6) or Rule 56 and therefore affirmed the decision.

C. Statement of Facts.

1. The Purported Lanham Act Violation.

In May 1977, Rudy Durand sold to Simon Productions No. 2, Inc.[4] his original motion picture screenplay entitled

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[4]As further definition is unnecessary for a determination of the instant petition, and for simplicity, hereinafter Simon Productions No. 2, Inc., Simon Film Productions, Inc., Melvin Simon Productions, Inc. and Melvin Simon will collectively be referred to as "Simon."

"Tilt" and Simon agreed to finance the production and distribution of a feature motion picture based on that original screenplay. The parties further agreed that Durand would produce, direct, select the cast, select the production crew, select the composer(s) of the musical score and supervise the editing of "Tilt." In recognition of Durand's contribution to the motion picture, the parties agreed that in exploiting the motion picture Durand's name would appear immediately before the title so that it would read as follows: "Rudy Durand's Tilt."

The first preview of "Tilt", held in August 1978, was not a success. In September 1978, Simon requested that Durand make various editing changes in the motion picture, which changes Durand made. In October 1978, Simon previewed this second version (the Release version). Based on the results of this preview Warner Bros. Inc. agreed to try to distribute the Release version. At the time of its distribution Durand claimed full credit for the Release version and was the moving force behind its marketing.[5] The Release version opened in April 1979 in ten cities around the country, but did not perform well. After learning that "Tilt" had failed, Durand asked Simon for permission to re-edit "Tilt" a third time. Simon agreed in a letter to Durand that Simon would screen and analyze this third version and that Simon would then make the final determination regarding any future exploitation or distribution of "Tilt."[6]

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[5]Respondents' "Opposition to 'Motion For Leave To Consider Affidavit Of Rudy Durand Correcting Misstatements Made In Oral Argument On Appeal'" has been lodged with the Clerk of the Court. Attached to it are various articles from the *Houston Post*, the *St. Louis Post Dispatch*, the *Los Angeles Times*, the *New Orleans Time Picayune* and other newspapers, which articles reflect interviews in which Durand claims full credit for the Release version.

[6]A copy of the letter was attached to and incorporated in both the first amended and the proposed second amended complaints and is included in the Excerpts of the Clerk's Record filed with the Ninth Circuit ("Record") at 206 and 517.

Durand's third recut of "Tilt" was test-screened in New York City in fall 1979, but was not well received. In what subsequent exploitation of "Tilt" there has been, Simon has used the Release version rather than this third version of "Tilt." The gravamen of the petition is that exploitation of the Release version after the creation of the third version, which Durand prefers, is a violation of the Lanham Act.[7] At no time has Durand requested that his name be taken off the screen credits of the Release version of "Tilt" or asked that said credits be changed in any manner whatsoever.

2. Disposition of the Lanham Claim at the District Court and in the Ninth Circuit.

The District Court dismissed the first amended complaint and did not allow Petitioners to file the proposed second amended complaint. The court found that "Rudy Durand's Tilt" was not a false description, representation or designation as to the Release version or its source.

> "Petitioners would be able to state a cause of action under the Lanham Act if their allegation was that defendants themselves had recut 'Tilt' and then released it as 'Rudy Durand's Tilt.' However, the [proposed second amended] complaint itself clearly states that the . . . [Release] version was cut by Durand himself. . . . even if it were true that Durand was fraudulently induced to cut 'Tilt' to Warner's specifica-

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[7] "Petitioners do not contend that the making of the Warner Bros. version or its immediate exploitation constituted a violation of the Lanham Act. The violations occurred only after Durand had been given by Simon, at Simon's expense, his contractually authorized final cut and Respondents, with full knowledge that the final cut was available and was the only contractually authorized version, nonetheless began to substitute the Warner Bros. version of "Tilt" for the fully edited final cut prepared by Durand as his complete statement of his artistic creation." Petition at 23.

tions, this would not give rise to a Lanham Act violation, since 'Tilt' was not misdesignated as 'Rudy Durand's Tilt.' The movie was released as cut by Durand. . . . Plaintiffs cannot state a federal claim under the facts they have presented to this court."

The Ninth Circuit affirmed.

"The district court dismissed this action for lack of subject matter jurisdiction. The court, however, considered the merits of Durand's Lanham Act claim and should have evaluated the claim under Rule 12(b)(6)—failure to state a claim, or Rule 56—motion for summary judgment. This is not reversible error because this court can affirm on any basis presented in the record. [citation omitted] There is ample evidence to dismiss Durand's action under Rule 12(b)(6) or Rule 56. . . . To state a claim under [the Lanham Act] . . . , Durand must show that Simon either falsely designated the origin of Tilt or falsely described Tilt to the public. Durand has not made that showing. . . . Durand edited, and his talent was the origin of both versions of Tilt. Furthermore, Durand advertised, promoted, and helped to distribute the Warner version. Durand represented it as his own to the public, and he did not object until the film failed and he discovered that he still retained final cut authority. There is no violation of the Lanham Act."

3. The Pro Hac Vice Application.

In spring 1981, Jim Ortego, an attorney licensed to practice in Louisiana but not in California, made sworn application to the Central District for permission to appear in this action. The Central District requires that in order to make such an appearance one must neither reside nor work in the

State of California.[8] Hence, in making his application Ortego was required to and did swear: "I am not a resident of, nor am I regularly employed, engaged in business, professional or other activities in the State of California." The court, in apparent reliance upon Ortego's sworn application, gave its permission for Ortego to appear *pro hac vice*. However, Ortego also filed a "Supplementary Application" in which he admitted that at the time of his application he was a resident of California, was regularly employed in California, and was engaged in business, professional and other activities in California, and therefore was not eligible to appear *pro hac vice*.

Consequently, when, on April 22, 1981, the court denied Mr. Ortego's application for admission *pro hac vice*, apparently in the interim having reviewed the Supplementary Application, it properly applied Local Rule 1.

REASONS FOR DENYING THE PETITION

A. The District Court and the Ninth Circuit Were Correct That the Facts Presented by Petitioners Do Not Amount to a Violation of the Lanham Act.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prohibits the use of false designations of origin and false descriptions in the advertising and sale of goods and serv-

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[8]Rule 1 of the Local Rules of the Central District of California, as then in effect, made an attorney ineligible for admission *pro hac vice* if any of the following was true: (1) he was a resident of California; (2) he was regularly employed in California; or (3) he was regularly engaged in business, professional or other activities in California. *Pro hac vice* admission to the Central District is now governed by Rule 2.2.3 of the current Local Rules.

ices.[9] To state a claim under § 1125(a), Petitioners must show that Respondents either falsely designated the origin of "Tilt" or falsely described "Tilt" to the public.[10] The Release version is, however, Rudy Durand's "Tilt." By contrast, in *Gilliam v. American Broadcasting Companies*, 538 F.2d 14 (2d Cir. 1976) and *Jaeger v. American International Pictures, Inc.*, 330 F.Supp. 274 (S.D.N.Y. 1971), the courts found Lanham violations where defendants materially altered the artist's work without his permission and then falsely presented the work to the public as the artist's own. *See, e.g., Follett v. New American Library, Inc.*, 497

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[9]15 U.S.C. § 1125(a) provides:

> "Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

[10]Though it is not necessary that the representation be literally false, the acts of defendant must create a false impression of the product or its source. *Gilliam v. American Broadcasting Companies*, 538 F.2d 14, 24 (2d Cir. 1976). *Accord McNeilab, Inc. v. American Home Products Corp.*, 501 F.Supp. 517, 532 (S.D.N.Y. 1980) *modified*, 501 F.Supp. 540 (1980); *Universal City Studios, Inc. v. Sony Corp. of America*, 429 F.Supp. 407, 410 (C.D. Cal. 1977); *Rare Earth, Inc. v. Hoorelbeke*, 401 F.Supp. 26, 38 n.22 (S.D.N.Y. 1975); *Mortellito v. Nina of California, Inc.*, 335 F.Supp. 1288, 1294 (S.D.N.Y. 1972); *Geisel v. Poynter Products, Inc.*, 283 F.Supp. 261, 267 (S.D.N.Y. 1968).

F.Supp. 304 (S.D.N.Y. 1980). The decisions of the District Court and of the Ninth Circuit are consistent with these cases. Here, Durand consented to the editing demands of various of the Respondents, took full credit for the Release version, and then actively participated in its marketing. Given his extraordinary level of contribution to the Release version and its distribution, Petitioners have no basis to claim that Durand's credit violates the Lanham Act. *See Autry v. Republic Productions, Inc.*, 213 F.2d 667, 669-70 (9th Cir. 1954), *cert. denied*, 348 U.S. 858 (1954).[11] There is no need for this Court to review the Ninth Circuit's decision.

Nor can Petitioners argue that this Court should grant certiorari because the Lanham issue raised will have far-reaching precedential impact or because it is an important issue. Because the facts of this case are convoluted and not likely to reoccur, only Petitioners would be benefited by this Court's review of the Ninth Circuit decision.

B. There Is No Merit to Petitioners' Contention That Durand's Due Process Rights Were Violated.

Petitioners do not claim that Local Rule 1 was not applicable to Mr. Ortego, but contend only that Local Rule 1 denies *pro se* Petitioner Rudy Durand his due process rights. This Court has flatly rejected the contention that due process rights are involved in *pro hac vice* applications. *Leis v. Flynt*, 439 U.S. 438, 441, 443-44 (1979), *reh'g denied*, 441 U.S. 956 (1979); *see also Norfolk & Western R. Co. v. Beatty*, 400 F.Supp. 234 (S.D. Ill. 1975), *aff'd*, 423 U.S. 1009 (1975);

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[11] Indeed, given Durand's level of contribution to the Release version and his agreement with Simon, had Simon omitted his credit from "Tilt", Respondents might have been accused of violating the Lanham Act on the theory of implied reverse passing-off. *Smith v. Montoro*, 648 F.2d 602, 606-607 (9th Cir. 1981).

Silverman v. Browning, 414 F.Supp. 80 (D.Conn. 1976), *aff'd*, 429 U.S. 876 (1976).

Immediately after Mr. Ortego was denied admission, Petitioners filed, in rapid succession, an ex parte application to have Mr. Ortego reinstated and an application to have the trial judge removed or disqualified. In neither of these motions did the Petitioners challenge the constitutionality of Local Rule 1.[12] After Petitioners' applications were denied, Petitioners filed a petition for writ of mandamus to the Ninth Circuit asking that it disqualify the trial judge and order Mr. Ortego admitted. Again, their petition did not challenge the constitutionality of Local Rule 1. While the Ninth Circuit, on its own motion, requested the Los Angeles County Bar Association to file an amicus brief on the constitutionality of Local Rule 1, the court ultimately declined to address that issue because Petitioners failed to raise it below. (Appendix B to Petition.)

Thereafter, Petitioners filed an ex parte application for transfer of the case and a supplementary application to have Mr. Ortego reinstated as an attorney. Petitioners alluded to the constitutionality issue, but failed to brief or argue it.[13] In subsequent supplemental papers Petitioners stated that they were "prepared to challenge the constitutionality of Local Rule 1," but requested that the court "in the interest of expediting justice . . . order the immediate reinstatement of Jim Ortego as Attorney of Record for corporate

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[12]Indeed, Petitioners admitted in their motion papers that an out-of-state lawyer does not have a due process right to appear *pro hac vice*, citing *Leis v. Flynt*, *supra*.

[13]Petitioners were "[p]repared, if this Court so determines, to argue that Local Rule 1 is unconstitutional both on its face and as applied to the facts of this case." Ex Parte Application For Transfer, dated September 4, 1981, and filed with the Central District of California.

plaintiffs in the exercise of the Court's supervisory authority over the admission of attorneys and pursuant to F.R.C.P. 83." Petitioners went on to state that to require them "to argue the constitutionality of Local Rule 1 at a full Hearing will delay this Court [in] reaching the merits of the Motion for Preliminary Injunction and cause plaintiffs irreparable harm . . ."[14] Thus, rather than presenting their constitutional claims, Petitioners in essence requested that the District Court not consider the constitutionality of Local Rule 1.

The District Court denied Petitioners' applications without any reference to the constitutionality of the Rule.[15] Petitioners sought immediate review by the Ninth Circuit, filing an emergency petition for writs of mandamus and prohibition on September 29, 1981. This petition nowhere suggests that Local Rule 1 is unconstitutional.[16] On September 30, 1981, the Ninth Circuit denied the petition without mentioning Local Rule 1 or its constitutionality.[17]

Petitioners did not raise the issue of the constitutionality of Local Rule 1 in their appeal to the Ninth Circuit from the judgment of dismissal. Petitioners, therefore, ask that this Court become the first court to consider this issue. Petitioners do not explain why they failed to properly raise the

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[14]Petitioner's "Ex Parte Application for Reconsideration" dated September 14, 1981 and filed in the Central District of California.

[15]Minute Order of September 11, 1981, Docket No. 66, Central District of California; Minute Order of September 28, 1981, Docket No. 78, Central District of California; Order of October 6, 1981, Docket No. 76, Central District of California.

[16]Petitioners' "Emergency Supplemental Petition," dated September 29, 1981, is on file with the Ninth Circuit.

[17]Order of September 30, 1981, Docket No. 73, Central District of California.

issue in the trial court or in any of their appeals to the Ninth Circuit. Nor do they justify their argument before this Court that there is a due process right to admission *pro hac vice* when they previously admitted in the trial court that there is no such right. Under these circumstances, there is no reason to depart from the general rule that a federal appellate court does not give consideration to issues not raised below. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941). Petitioners should not be allowed to appeal on one ground and upon finding that ground unavailing, urge a new ground as a basis of a certiorari petition before this Court.

C. This Case Is Not a Suitable Vehicle for Review of Any Issue By This Court.

This is a particularly inappropriate case in which to grant certiorari because, as is clear from the petition, this is not a case in which the Court may rely on Petitioners to present a clear, concise and accurate picture of the evidence and issues below. The stream-of-consciousness petition frequently makes factual assertions unsupported by the record, inferences unsupported by logic, and legal arguments unsupported by law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Ninth Circuit should be denied.

Respectfully submitted,

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**Counsel of Record*

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The parent company is: MELVIN SIMON PRODUCTIONS, INC.

The subsidiaries are:

SIMON TELEVISION, INC., SIMON FILM PRODUCTIONS, INC., SIMON DISTRIBUTORS, INC., SIDAN PRODUCTIONS, INC., DITCH ROAD MUSIC, INC., MEL REN MUSIC, INC.

2. Re: National Broadcasting Company, Inc.:

The parent company is: RCA INC.

National Broadcasting Company, Inc. is a wholly owned subsidiary.

3. Re: Warner Bros. Inc.:

The parent company is: WARNER COMMUNICATIONS INC.

Warner Bros. Inc. is a wholly owned subsidiary of Warner Communications Inc.

The subsidiaries of Warner Bros. Inc. are:

AFRAM FILMS INC., AMERICAN MOTION PICTURE EXPORT, ATHWARN MUSIC CO., INC., CHATHAM MUSIC CORPORATION, COLUMBIA & WARNER FILMES DE PORTUGAL, LTDA., LOMBARDO MUSIC, INC., MANSFIELD MUSIC CO., INC., MOTION PICTURE EXPORT ASSOCIATION OF AMERICA, INC., NEW WORLD MUSIC CORPORATION, NINE STAR MUSIC CORP., RODART MUSIC CORPORATION, SHUBERT MUSIC PUBLISHING CORPORATION, SUPREME MUSIC CORPORATION, VERNON MUSIC CORPORATION, WARNER BROS. (D) (APS), WARNER BROS. MUSIC INTERNATIONAL INC., WEILL-BRECHT HARMS COMPANY, INC., WESTERN COSTUME CO.

4. Re: Viacom International, Inc.:

The parent company is: VIACOM INTERNATIONAL, INC.

The subsidiaries are:

SHOWTIME/THE MOVIE CHANNEL INC., LIFETIME PRODUCTIONS INC., SATELLITE HOLDINGS INC., SHOWTIME/THE MOVIE CHANNEL (U.K.), ST/TMC PRODUCTIONS INC., CABLE HEALTH NETWORK INC.

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CASE NO. 84-843

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RUDY DURAND and KOALA PRODUCTIONS, LIMITED,

Petitioners,

v.

SIMON PRODUCTIONS NO. 2, INC.; SIMON FILM PRODUCTIONS, INC.; MELVIN SIMON PRODUCTIONS, INC.; MELVIN SIMON; NATIONAL BROADCASTING COMPANY, INC.; WARNER BROS., INC.; VIACOM INTERNATIONAL, INC.; MYRON L. SLOBODIEN; LEROY BOBBITT; LOEB and LOEB; JOHN FRANKENHEIMER; RICHARD B. KAPLAN; and KAPLAN, LIVINGSTON, GOODWIN, BERKOWITZ and SELVIN,

Respondents.

PETITIONERS' REPLY BRIEF

TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONDENTS HAVE FAILED TO ARGUE THE ISSUE AS TO WHETHER OR NOT DURAND HAD THE CONSTITUTIONAL RIGHT TO SELECT AN ATTORNEY OF HIS CHOICE

Respondents mistakenly argue whether or not some anonymous attorney has a constitutional right to appear in Court on behalf of a client.

The issue is not the constitutional rights of a pro hac vice attorney, but the rights of Durand, the client to select an attorney of his choice, and to utilize the Federal Rules and Statutes.

Local Rule 1 of the district court states that unless authorized by the constitution of the United States or acts of Congress, an attorney is not eligible to practice pursuant to this paragraph B, if any one or more of the following apply to him: (i) He resides in California; (ii) He is regularly employed in California; (iii) He is regularly engaged in business in California.

Durand's attorney of choice, James Ortego, was a professor of law at Whittier College in California. He believed that because Durand would be acting in pro se and that Richard Haynes, Esq., of Houston, Texas, was lead counsel, the district court would allow Ortego under these special circumstances to collaborate with Durand and appear for the corporate plaintiff. James Ortego was initially approved by the District Court to represent Koala Productions. Subsequently, the District Court revoked its prior authorization, summarily, and without a hearing. (See Petitioners' Reply Memo, Ninth Circuit, regarding amicus memo dated July 31, 1981, particularly pages 1, 2, and 3.)

On page 10 of Respondents' brief in opposition, they state in effect that immediately after Mr. Ortego was denied admission, Petitioners rushed in with motions to the district court which failed to challenge the constitutionality of Local Rule 1. First of all, Mr. Ortego was not denied admission, he had been

approved due to special circumstances after having made full disclosure to the district court of his residency and employment in California and in fact represented Koala Productions for over a month in the District Court. Respondents' callous accusations on pages 6 and 7 of their brief in opposition herein are not true.

On page 2 of Respondents' Brief in Opposition, they extend their deliberate mischaracterization of the record by stating that Petitioners do not claim that either of the lower courts misinterpreted the law or misunderstood the facts of this case. Again, the actual record when considered as a whole defeats Respondents mischaracterization and continued attempts to avoid the issues.

In response to Respondents' misstatements that Durand did not assert that either the District Court or the Ninth Circuit Court of Appeals misinterpreted the law or misunderstood the facts of this case, Petitioner Durand invites the Court's attention to the following:

1. Petitioners' Opening Brief to the Ninth Circuit Court dated October 28, 1983, pages 32 and 33, paragraphs 2, 3, and 4, and page 16, inclusive.

2. Petitioners' Reply Brief to the Ninth Circuit Court dated September 27, 1984, at pages 8 and 9, paragraphs 1, 2, and 3, thereof.

3. Petitioners' Petition for Rehearing En Banc to the Ninth Circuit Court dated June 22, 1984, at pages 7 through 14, and Exhibits thereto, which include the comprehensive and fully briefed new matters tried by Petitioners and not answered, objected to or denied, by Respondents which more than sufficiently state a proper Lanham Act violation.

Therefore in truth and in fact the records show that Petitioners continually challenged both lower courts interpretations of the law and facts of the case.

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CONTRARY TO RESPONDENTS' ASSERTIONS, DURAND CONSTANTLY CHALLENGED THE CONSTITUTIONALITY OF LOCAL RULE 1 IN THE LOWER COURTS

Respondents in the opposition brief continue to mischaracterize the record to a degree that now borders on perpetrating a fraud on this Court. On page 10 of said brief, Respondents baldly assert that Petitioners made no challenge to the constitutionality of Local Rule 1 in either court. Then what was it that the Ninth Circuit Court referred to in its order dated August 27, 1981, (see Exhibit B to Petition)wherein that court on page 2, paragraph 6 thereof, stated that having determined that Petitioners' mandamus have not presented their challenge to the constitutionality of Central District Rule 1 to the District Court, we decline to address the issue. What issue? If not Petitioners' challenge to the constitutionality

of Local Rule 1, which was the basis of Petitioners' Writ of Mandamus and/or Prohibition, then what issue? See Ninth Circuit Court's response to Petitioners' Writ of Mandamus, Ninth Circuit Court order dated May 20, 1981, page 1, paragraph E thereof, wherein the Ninth Circuit Court stated the amicus curiae memo shall discuss the validity of Local Rule 1 of the District Court of the Central District of California. More importantly, the Ninth Circuit ordered that a copy of said order be served upon the interested district judge. The order was so served. What validity was the Ninth Circuit Court referring to, if not the constitutional validity of Local Rule 1? Therefore by ordering an amicus, the Ninth Circuit caused Petitioners to make the challenge below.

The result of the Ninth Circuit Court's order as to the amicus was that, after nearly a year of endless pleadings, Petitioners never saw the light of day on the constitutional issues. The Ninth Circuit Court's two judges, the

Honorable Goodwin and Ferguson, who originally considered Petitioners' Writ of Mandamus, ordered what resulted in that year's multiplicity of proceedings, directly related to Petitioners' challenge. Subsequently they were somehow replaced by two other judges, the Honorable Wallace and the Honorable Boochever. These new judges and their order of August 27, 1981, denied Petitioners' Writ of Mandamus stating, (a) "Petitioners have not demonstrated a clear and indisputable right to disqualification. The alleged bias of the trial judge pertains primarily only to adverse trial rulings." Petitioners' have experienced a species of death in these four years of outrageously ill-flated efforts to be heard on the actual merits of their submissions. Petitioners have made one of the clearest cases against the lower court's trial judge for obvious and continuing hostility toward Petitioners and improper subsilentio maneuvers. See Petitioners' Ex-Parte Emergency Motion for Relief, FRPC60, May 27, 1981, District Court.

Where were the Honorable Wallace and Boochever's considerations as to the amicus curiae brief ordered months before by the Honorable Goodwin and Ferguson. After months of Petitioners' submissions, responses, replies, and supplemental submissions, all of that effort was completely wasted.

Time ran out while Petitioners battled in the District Court to get a hearing on the constitutional challenge they had made in the District Court months before. The District Court avoided the issue. Instead, the District Court resurrected Petitioners' motion for relief from order (60B), which had been denied by one district judge, but reclassified as a motion for reconsideration by District Court Chief Judge Hauk. Said Chief Judge set that motion for hearing on September 28, 1981, as a motion for reconsideration of Petitioners' claim as to the bias of Judge Marshall, and the unconstitutionality of Local Rule 1. The transcript of that hearing speaks for itself.

See Reporter's Transcript of said hearing dated September 28, 1981. Judge Hauk refused to allow either Ortego or Durand to be heard. He vilified Ortego, banished him from the gallery of the court under threat of incarceration, and then proceeded to chastise Durand, ordering from the bench that the clerk of the court no longer accept any further submissions by Petitioners that in any way related to the disqualification of the trial judge or to Local rule 1. A few days later, on September 30, 1981, the Ninth Circuit Court came down with an order and response to Petitioners' emergency writ of mandamus and prohibition filed September 25, 1981.

Time ran out, Petitioners were denied the right to be heard on the issues despite the fact that it was the Ninth Circuit Court that had months before ordered a full briefing by Petitioners as to that issue, and an amicus curiae brief regarding the validity of the Central District Local Rule.

In view of the record as outlined above, Respondents claim that Petitioners' never challenged the Constitutionality of Local Rule 1 in the lower Courts evidences a misstatement of the record and facts to this Court by the Respondents.

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CONTRA TO RESPONDENTS' ARGUMENT,
THE LANHAM ACT DOES APPLY AND THEREFORE
THERE IS FEDERAL JURISDICTION

Respondents assert that a strict reading of the Lanham Act demonstrates that such act is not applicable to this action, as Durand approved and helped market the only version released, the unauthorized Warner version. Respondents, however, admit in their brief that Durand has asserted all along that his apparent approval of, and aid in, the marketing of the released version of the film, was the result of fraud and misrepresentation. Respondents then conclude

that such alleged fraud and misrepresentation must be ignored, as irrelevant, and that only the result - Durand's supposed approval and marketing efforts - must be looked at in relation to the wording of the Lanham Act.

Durand respectfully submits that Respondents' assertion makes a farce of the Act, or any other law or acts, as they are asserting, incredulously, that one can use ones own fraud and misrepresentation to circumvent the clear purpose of a law, in this case, the Lanham Act. It is hardly necessary to cite cases to the Court for the propositions that:

1. One should not, indeed cannot, benefit by their own fraud,

2. If consent is given under fraudulent circumstances, such fraud acts to vitiate the consent given by the innocent party.

The facts upon which Durand's claim of fraud and misrepresentations are based are as follows:

Respondents at the time were aware of Mr. Durand's proposed breakdown of changes, including

a new continuity as to story-line and character presence he intended to prepare. Mr. Durand proposed that major sequences be eliminated, the story-line be redefined, and the presence of lead characters be shifted as to importance and introduction in the film.

Respondents replied to Mr. Durand's proposed changes by closing his cutting rooms without any prior notice. Thereafter, they invoked the illusory Warner Bros. distribution agreement, which they alleged set forth certain demands relating to overriding creative control and editorial supervision of the film.

The die was cast. The doors were closed, and the gun remained at Mr. Durand's head, all the result of fraud in the inducement.

Durand was lead to believe that there would never be any other version of his film but the Warner version. They told Durand that a six million dollar distribution with Warner Bros. would be jeopardized if Mr. Durand did not do an about face and cooperate.

As Mr. Durand said very clearly in his complaints, he went out to those six or so cities and did his "tap dance", not to his own tune, but to the tune of the Respondents.

Respondents, and all of them had the opportunity after Durand learned of the fraud and demanded his final cut, to state at that time any and all of the objections and defenses they now present to this court. Respondents know or should know that their defenses and objections are unfounded because there would have been no Durand version if Respondents had denied Durand his contractually authorized final cut of the picture. Upon completion and delivery, the clearly different Durand version became the only contractually authorized version of the motion picture "TILT". This final version was the version Durand, as the designated person pursuant to his contract and pursuant to the Directors Guild Agreement, chose to be the last version of the film. After delivery, he no longer had any control over the final version, when the

Respondents substituted the Warner version for Durand's contractually authorized final cut of the picture. Respondents made the substitution despite prior written notice and written demand by Durand that his final cut be the only version utilized for any further distribution, exploitation, and/or sale to television or pay cable anywhere in this country or in the world.

Petitioners further invite this Court to see Petitioners' Petition for Rehearing En Banc to the Ninth Circuit dated August 1, 1984, which was filed and served, but never heard.

In conclusion, Petitioners' position is that the lower courts' decisions in this case thus far have created new restrictions as to the Lanham Act. The door once opened by the Ninth Circuit Court which gave hope to all artists, directors, writers, actors, that at last they would be protected against misidentifications, misrepresentations or substitution of their artistic contribution and intent, may once again be closed.

CONCLUSION

This is a very appropriate case for the United States Supreme Court to review both as to the Constitutionality of Local Rule 1 as applied to Durand and as to the boundaries of the Lanham Act. Durand and numerous producers, directors, writers, and actors, within the Motion Picture Industry need this Court to set the standards as to these facts where such persons should be protected to the fullest extent when they assert a Lanham Act violation in the Federal Courts of this country.

For the foregoing reasons, Petitioners once again respectfully request this Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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